EMPLOYMENT TRIBUNALS

Claimants: Mr. M. A. Kesen

Respondent: London Fire Commissioner

PUBLIC PRELIMINARY HEARING

Heard at: London South (via CVP video conference)

On: 29th November 2024

Before: Employment Judge Sudra

Appearances
For the Claimant: In Person (unrepresented)
For the Respondent: Ms. S. Tharoor of Counsel

References in the form '[xx]' denote pages in the Preliminary Hearing bundle used on 29th November 2024.

JUDGMENT

The Claimant's allegations[1], 5.1 to 5.8 (direct race discrimination) and 12.1 to 12.7 (victimisation) are struck out. The Claimant's remaining claims will proceed to a Final Hearing.

[1] As per the List of Issues annexed of EJ Ord's Case Management Order of 10th July 2024.

WRITTEN REASONS

1. Following a public Preliminary Hearing on 29th November 2024, these written reasons (in respect of the refusal of the Claimant's application to amend his claim and the decision to strike out parts of the Claimant's claim) are being provided following a request from the Claimant made on, 11th December 2024.

Application to Amend Claim

2. The Claimant submitted his ET1 on 15th September 2023 with a Particulars of Claim document which was six pages long. The only labelled claim was for direct race discrimination. I accepted that the Claimant was a Litigant-in-Person and may have had no legal advice when submitting his claim. The matters he complained about span the period, July 2014 to 24th March 2023.

3. This is a significant period of time. At a Preliminary Hearing on 10th July 2024 before Employment Judge Ord, the claims were further discussed and distilled into a LoI which [128]. At the Preliminary Hearing harassment was discussed in detail and the Claimant agreed that there was no harassment complaint. The Claimant had sent the Tribunal and Respondent a witness statement in advance of the PH [98] but it had not made its way into the bundle as the Preliminary Hearing was for case management. I read that witness statement. The Claimant could have referred to the matters contained within his witness statement but did not.

4. On 7th August 2024, Claimant sent to the Tribunal and Respondent a List of Issues which was an amended version of the document drafted by Employment Judge Ord.

5. On 23rd August 2024 I directed that the Claimant could not add to the List of Issues but must make an application to amend; which he did on, 7th October 2024 [164].

6. The Claimant's proposed amendments were added to the document at [166], in red line format for ease of reference.

Law

7. The Employment Appeal Tribunal held in *Selkent Bus Company Ltd v. Moore* [1996] ICR 836 EAT: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of 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. Mummery J (as he then was) explained that relevant factors would include:

'The nature of the proposed amendment; the applicability of time limits to the new claim or cause of action; the timing and manner of the application to amend; and prejudice to the parties.'

8. These factors are not exhaustive and there may be additional factors to consider, (for example, the merits of the claim).

9. In respect of the balance of prejudice, HHJ Tayler in *Vaughan v. Modality Partnership* UKEAT/0147/20/BA(V) stated:

"… Representatives have a duty to advance arguments about prejudice on the basis of 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 … [26] a balancing exercise always requires express consideration of both sides of the ledger, both quantitatively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice. [27] Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it. [28] An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional costs; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice."

10. In *Galilee v. Commissioners of Police of the Metropolis* [2018] ICR 634, EAT HHJ Hand QC held (at para 109(a)) that,

> ***'amendments to pleadings in the ET which introduce new claims or causes of action take effect for the purposes of limitation at the time permission is given to amend'***

Conclusions

11. As has been said by the appellate courts, an ET1 or Particulars of Claim are not documents which merely get the ball rolling and which can be added to and expanded as the claim progresses. An ET1 is the Claimant's pleaded claim.

12. A Respondent is entitled to know at the earliest possible stage what allegations it must defend.

13. The Claimant's claim for indirect race discrimination does not make sense as the PCP relied upon (to favour non-BAME employees for training over those of BAME background, as well as treating non-BAME employees more favourably than BAME employee) is not a PCP that has a reasonable prospect of success.

14. I took the view that the Claimant had raised new claims and made previously unpleaded factual allegations. The prejudice to the Respondent, in allowing the amendment sought, outweighed any prejudice to the Claimant by not allowing it.

15. The Claimant's amendment application related to events alleged to have occurred from as far back in time as 2014. It would, as a matter of common sense, be difficult for individuals to remember, with any degree of accuracy if at all, the nature and content of oral conversations. The Respondent's submission was accepted that if any documentary evidence existed relevant to the Claimant's instant allegations it would be extremely difficult to retrieve, if it even still existed.

16. Allowing the amendment would not have been dealing with the case, in a way which was proportionate to the complexity and importance of the issues, avoided delay or saved expense.

17. There was also the timing and manner of the application. It was not made at the first possible opportunity and could have been included in the Claimant's ET1 and an application to amend could have been included in the Further and Better Particulars document produced on 30th May 2023. It was not made within a reasonable period thereafter. Allowing the Claimant's amendment would have caused significant hardship to the Respondent as they would have to search for dated evidence, incur additional expense and tender witness evidence from individuals in respect of matters which are said to have occurred over at least two years ago and of which, they may have little, if any, memory of.

18. The Respondent would haver been unduly prejudiced, and the balance of hardship was in favour of it. My decision did not affect the Claimant's extant claim which will procced to a Full Hearing.

19. For these reasons, the Claimant's application to amend his claim was refused.

Strike out of Claims

20. The ET1, which was presented on 15th September 2023, was preceded by Acas early conciliation; 'Day A' being 8th June 2023 and 'Day B' being 20th July 2023.

21. Therefore, any acts which were alleged to have occurred prior to 9th March 2023 were prima facie outside of the primary time limit unless an extension of time was allowed.

22. The basis of the Respondent's application for a strike out [69] was that save for the allegations at paragraphs. 5.9, 5.10, 12.8, and 2.9 of the List of Issues, all other allegations were out of time. Whilst the allegations at 12.8-12.9 of the List of Issues were accepted as in time by the Respondent, it was said

that they are weak claims and are alleged to have taken place a very long time ago.

23. In coming to me decision I read the Respondent's strike out application and the Claimant's response [160], which addressed each of the Respondent's points in turn, and considered the parties oral submissions.

24. In summary, the Respondent said that the Claimant's out of time allegations were not continuing acts and three was no just and equitable reason to extend time. The Claimant said that his allegations *did* form part of a continuing act and if not, it *would* be just and equitable to extend time. I took into account that the Claimant was a Litigant-lin-Person with little or no legal knowledge in this area, although he has been a trade union member from the inception of his employment.

25. I made no findings of fact for the purposes of my decision, and proceeded only on the basis of the documents available. I have been mindful to take the Claimant's claim at its absolute highest.

26. The Claimant was employed by the Respondent on 17th September 2002, as a firefighter, and remains in his employment.

27. It is the Claimant's case that from 2014 to date, he experienced direct race discrimination and victimisation. The Claimant is of Turkish/Kurdish/Asian heritage.

28. The Claimant's direct race discrimination allegations were at [129-130] paragraph's 5.1 – 5.10. His victimisation allegations were at [131] paragraphs 10 – 13.

Law

29. The law in respect of strike out is complex but, the principles are clear.

30. Rule 37 of the ET Rules provides (so far as material):

'(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
(a) that it is scandalous or vexatious or has no reasonable prospect of success;
….

31. The effect of a strike out is to terminate the claim or the part of the claim. It is a draconian jurisdiction, and the relevant case authorities underlie its exceptional nature. This is particularly so where the substantive case features allegations of unlawful discrimination, as it is *'a matter of high public interest'* that such cases are heard (as per Lord Steyn in *Anyanwu v. South Bank Students' Union* [2001] IRLR 305).

32. The Respondent accepted in their written application that strike out of a claim, particularly a discrimination claim is an exceptional step to take and one that must not be taken lightly. The Respondent fairly and accurately set out the relevant law in its application.

33. S.123 of the Equality Act 2010 ('EqA') provides (so far as material):

'123 Time limits
proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 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.

conduct extending over a period is to be treated as done at the end of the period.'

34. As was pointed out by the Respondent, a one-off act which has continuing consequences is not a continuing act but a succession of isolated incidents that are linked to one another may amount to continuing acts.

35. When a claim is brought out of time, the Tribunal may extend time if it is 'just and equitable' to do so, and in *Robertson v. Bexley Community Centre* (t/a Leisure Link) [2003] an extension on this basis was said to be the exception and not the rule. The burden is on a Claimant to show why it would just and equitable to extend time or why the allegations form part of a continuing act.

The Allegations

36. The Claimant's most historic allegation related to July 2014 (5.1) and the next allegation (5.2) is said to have taken place nearly four years later in 2018 involving different individuals.

37. There is then a gap of over one year to the next allegation (5.3) again involving a different character.

38. Allegations (5.6-5.7): Both related to Ms. Carr, but are two years outside of the primary time limit. Ms. Carr does not feature in any allegations before May 2021 or after January 2022.

39. Allegation (5.8): This involved a third party (CMP solutions Limited) who are not a Respondent and this allegation was out of time.

40. Therefore, it was apparent to me that there was no continuing act and allegations (5.1 – 5.8) were struck out for want of jurisdiction. Allegations (5.9 and 5.10) remained intact.

41. The Claimant himself said that managers frequently *'came and went'* which was further evidence making a continuing act unlikely.

Victimisation

42. The Claimant's victimisation complaint was in time albeit that the protected act was said to have occurred in July 2014. I did not know if the Claimant made allegations of breach of the EqA but he said that he believed he did and I accepted that as the issue will readily be tested in evidence at the FH.

43. For the same reasons I have provided in respect of the struck out allegations, allegations (12.1-12.6) are not part of a continuing act, and were also struck out.

44. Allegation (2.7): This was struck out on the same basis as allegation (5.8).

45. I did not strike out allegations (12.8-12.9) but found that they did not have no reasonable prospect of success. However, I found that they had little reasonable prospect of success and therefore, made a deposit order in the sum of £100.00 per allegation for those claims to proceed; making a total deposit to be paid of £200.00. I reminded myself the purpose of a Deposit Order was not to deter a Claimant from litigation bit to focus their mind.

46. My reasons for making a Deposit Order were set out in that Order.

Employment Judge Sudra
Date: 17th December 2024

Judgment sent to the parties on
Date: 31st January 2025