EMPLOYMENT TRIBUNALS

Claimant: Mr N Solanki

Respondent: The Home Office

Heard at: Liverpool (in private; By Video) **On:** 21 January 2025

Before: Employment Judge Benson (sitting alone)

REPRESENTATION:

Claimant: In Person

Respondent: Mr J McHugh (Counsel)

JUDGMENT having been sent to the parties on 30 January 2025, written reasons were requested on 4 March 2025. Although outside the relevant time limit, provided for in Rule 60(4) of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

REASONS

Issues

1. This was a preliminary hearing listed to consider the claimant's amendment applications, whether the claimant was a disabled person by reason of his impairments and further case management. It was originally listed for two days by Employment Judge Dunlop in her case management order of 24 June 2024, but following the claimant's ill health and his inability to attend the hearing listed in October 2024, Employment Judge Cookson re-listed it for one day as that was all that the Tribunal could allocate before the final hearing which was listed for 6 7 8 and 9 May 2025. Employment Judge Cookson's case management order 14 October 2024 at paragraph 15 detailed the issues to be considered.

2. At the hearing before me, we had sufficient time to consider the applications to amend and agree case management orders but there were a number of IT issues with the Tribunal system, and it was agreed that the disability status issue would be considered at the final hearing.

3. Prior to considering the claimant's applications, he provided clarification as to the two amendment applications he was making.

    a. The first was to add to the list of impairments he relied upon in his disability discrimination complaint. That application was granted in part. Details are given in my note and case management order of 21 January 2025. There is no request for written reasons in respect of this decision.

    b. The second application was to amend the claim to include complaints of direct and indirect race discrimination in respect of allegations (a) (b) and (d) in the Schedule of allegations set out in Employment Judge Ross' order of 18 April 2023. These related to the first job application in January 2021 and were as follows:

        i. (a) failing to appoint the claimant to the position of Project Support Officer 3 in IT Moves & Changes following an interview on 11th February 2021 despite its initial offer of the position to him, and acknowledgment on 12th March 2021 that he had been the strongest candidate interviewed;

        ii. (b) refusing to appoint the claimant to the post on the pretext of his then immigration status, but failing to put him on the reserve list;

        iii. (d) fail to offer the claimant the same position when it was or became vacant in about December 2021

4. The claimant has clarified today that the allegations relied upon in his direct discrimination claim are (a) (b) and (d), and not (c) as detailed in Employment Judge Dunlop's order.

5. Employment Judge Dunlop, in her Annex to her order set out what she understood the basis of the claimant's complaints of direct and indirect race discrimination to be. His indirect claim is based upon the policy, criteria or practice of "Not appointing non-British citizens for the role that the claimant applied for, regardless of the strength of their application." The claimant says that this policy, criteria or practice put people of Indian origin at a particular disadvantage. The reason given to the claimant for not appointing him was that his immigration status required him to be sponsored and the respondent did not have a sponsorship licence.

6. The claimant was given the opportunity by Judge Dunlop to explain why this claim was not included in his original claim form and the grounds for his application. He did this by way of his email dated 14 August 2024. I have considered the contents of that document, in addition to hearing representations from the claimant and Mr McHugh on behalf of the respondent.

7. I was provided with an agreed bundle of documents, and a skeleton argument prepared by Mr McHugh.

Facts and background to the application

8. The claimant contacted ACAS on 28 April 2022 and an EC certificate was issued on 1 June 2022. A claim was presented on 30 June 2022. The claimant ticked the box within the form confirming that he was bringing a claim of disability discrimination. All details on the form refer to disability complaints. There is no reference to his race or any race discrimination complaint. There is reference in his claim form that he was issuing a protective claim, as he was awaiting the outcome of an internal investigation from the respondent.

9. His complaints were clarified at a preliminary hearing at which he was represented by counsel on 18 April 2023. Those complaints were all disability related complaints. Employment Judge Ross noted that his counsel indicated that the claimant may wish to further amend his claim to include a claim for race discrimination based upon the same facts. No application was forthcoming.

10. At the hearing before Employment Judge Dunlop on 24 July 2024 the claimant raised the issue of a race discrimination complaint and as the claimant was not legally represented, she explored that with him. She treated this as an application to amend his claim. It was apparent that she was not entirely clear about the nature of the race discrimination claims he wished to bring. She noted that at the time of the events he was an Indian national and she understood the claim to be one of indirect discrimination, though also included a direct discrimination complaint in a draft list of issues both of which she confirmed would be subject to any application to amend. The claimant was given until 5 August 2024 to provide any further information in respect of his applications to amend. He did this by email of 14 August 2024 as referred to above.

11. There have been numerous delays in this case. The claimant has poor health and that combined with a view that the respondent was withholding information from him and any hearing should await the outcome of an internal complaint, resulted in preliminary hearings being postponed on 8 February 2023, 17 July 2023, 20 October 2023, 29 February 2024 and final hearings listed for 7 8 and 9 August 2023, 2 3 and 4 October 2023 and 14 15 16 and 17 October 2024 also being postponed.

12. On 21 February 2024, Employment Judge Holmes wrote to the claimant:

"If the respondent does not consent to the postponement, which will be the second one of this preliminary hearing, you will need to produce some cogent medical evidence as to why you cannot participate in the hearing. This is only a preliminary hearing, and you will not be required to give evidence. If you cannot conduct the hearing yourself, is there no – one who could either help you with it, or conduct it for you?

You should also be aware that if your health continues to prevent you from progressing your claims , and there is no prognosis that you will recover

sufficiently to be able to pursue your claims within a reasonable time, the time may come when the Tribunal has to consider whether a fair trial is possible, and , if not, whether the claims should be struck out. That is not yet the position, but you will appreciate that he Tribunal has to be able to progress the claims soon."

13. In March 2024, the claimant sought a stay of the proceedings. On 13 March Employment Judge McDonald wrote to the claimant as follows:

"The claimant has requested that the proceedings be stayed for 3 months. The respondent does not object to that application on condition that the final hearing listed for 14-17 October 2024 is postponed and relisted. Employment Judge McDonald has reviewed the case and replies as follows: "This case has been going on since June 2022. It is about a failure to appoint the claimant to a role with the respondent in early 2022. There have already been 4 postponed preliminary hearings. If the final hearing is postponed it is likely that the final hearing will take place in 2025, around 3 years after the events giving rise to the claim. In those circumstances, it is not in accordance with the overriding objective to stay the case and postpone the final hearing unless there are very clear reasons and evidence as to why the claim should be stayed and why the final hearing should be postponed.

The claimant has 2 main reasons for asking for a stay. The first reason is that he says there is an ongoing Civil Service Commission investigation into his case. The respondent says there isn't. It says that any internal investigations are at an end and that the claimant was told this on 8 July 2022 and 25 July 2023 (respondent's email dated 11 October 2023). The second reason is that the claimant says his health is not good enough to allow him to attend a hearing and progress the case. In his email dated 26 February 2024 he said he was due to have an appointment with his GP and a neurologist referral on 1 March 2024. He said he would share medical evidence tomorrow (i.e. 27 February about his health and "whether he can litigate this matter." He does not seem to have sent any such medical evidence to the Tribunal."

14. The application for a stay was refused.

15. In the case management order of Employment Judge Cookson she reminded the claimant of the risks of any further delays:

"I am aware from the file that over the course of this case a number of hearings had been adjourned on the grounds of the claimant's health. Tribunal judges are sympathetic to the difficulties that litigants in person face in coming to tribunal and we understand the pressure they feel under. Employment judges will do what they can to make adjustments for people with disabilities. What is important is that the claimant appreciates that the events that his claims relate to things which happened some very significant time ago. If the final hearing is not able to proceed next May, for whatever reason, there will inevitably be along delay in the tribunal being able to relist the final hearing. Delay inevitable impacts on the quality of the evidence available to the tribunal and there comes a point when a fair trial is no longer possible. Employment Judge Holmes warned the claimant about that in February 2024

and echo those concerns here. It is important that this case proceeds to hearing in May in 2025. If that is not possible the tribunal may consider it appropriate to determine a strike out application, if made by the respondent."

16. The final hearing is listed for 6 7 8 and 9 May 2025.

The Law

17. Rule 30 of the Employment Tribunal Rules of Procedure 2024 gives employment tribunals a broad discretion to allow amendments at any stage of the proceedings, either on the tribunal's own initiative or on application by a party. Such a discretion must be exercised in accordance with the overriding objective in Rule 3 of the Rules to deal with cases justly and fairly.

18. In determining whether to grant an application to amend, an 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. In **Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT** , Mr Justice Mummery, explained that relevant factors would include:

a. nature of the amendment

b. applicability of time limits

c. timing and manner of the application

d. Any other relevant factors such as the merits of the claim and compensation available

19. In the context of the discretion whether to allow a proposed amendment, the first key factor identified by Mr Justice Mummery was the nature of the proposed amendment. He made it clear that this should be considered first, before any time limitation issues are brought into the equation, as it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from 'relabelling' the existing claim. If it is a purely a relabelling exercise, then it does not matter whether the amendment is brought within the timeframe for that particular claim or not.

20. Whichever 'type' of amendment is proposed, the core test is the same: the tribunal must review all of the circumstances, including the relative balance of injustice, in deciding whether or not to allow the amendment. Tribunals conducting such a balancing exercise must therefore consider each case in its entirety.

21. In **Vaughan v Modality Partnership 2021 ICR 535, EAT,** His Honour Judge James Tayler emphasised that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The parties must therefore make submissions on the specific practical consequences of allowing or refusing the amendment. Where they do not do so, it will be difficult for them to challenge a tribunal judgment on the basis that the balancing exercise has not been carried out correctly**.** HHJ Tayler offered guidance on the correct procedure to be followed by tribunals and representatives.

Decision

22. The relevant principles I must consider in this application are those contained within **Selkent** and as reaffirmed in **Vaughan**. In balancing these factors, the overarching consideration is whether it is in the interest of justice to allow the amendment, balancing the relative hardship my decision would cause to each party.

23. I start by considering the nature of the amendment that is sought. The facts set out in the claim are brief. There is no mention in the claim form of a race discrimination claim; the claimant says he was waiting for an outcome from the respondent before he could decide upon such a claim. That is why he says he put his claim in on a protective basis. The claimant makes no suggestion that any of the allegations were because of his race. He does not mention it. He focusses upon a disability discrimination claim and a failure to make adjustments. At the preliminary hearing before Judge Ross, when the claimant had counsel representing him, no race claim was identified, nor is there a suggestion that the claim form includes one. It was left for the claimant to apply to amend his claim if he wished to proceed with such a claim. I find that now seeking to include a claim of race discrimination is not a minor matter but rather a substantive new cause of action.

24. As a new cause of action, one of the issues I must consider is applicability of the relevant time limits.

25. The event relevant to the application relate primarily to February 2021 though there is a further allegation relating to December 2021. The claimant did not contact ACAS until 28 April 2022 and his claim form was presented in June 2022. That was well over a year since the original allegations and outside the relevant time limits for the December 2021 allegation. Any amended claim would therefore be out of time and the claimant would need to apply for an extension of time on the ground that it is just and equitable to do so.

26. I must also consider the timing and manner of the application. It wasn't until April 2023 that there was any mention of a race discrimination claim, and not until over a year later in July 2024 that the claimant provided any details. The application is therefore some two and a half years since the last incident and more than three years since the job offer was withdrawn.

27. The claimant's reasons for this delay are set out in his email of 14 August 2024. In summary these are that he needed further information from the respondent, his ill health, and challenges as a disabled person, that his claim was put in on a protective basis and that there was an ongoing internal investigation which he hoped would result in a positive outcome for him. I have considered each of these in my decision.

28. Firstly, the claimant says that he was waiting for further information from the respondent. This is perhaps akin to a questionnaire procedure which used to be available within the Tribunal Rules, which allowed a request for further

information to assess whether a claimant may have the grounds for a claim. The information he requested was why his offer was retracted and why he wasn't put on a waiting list. The claimant was aware from an early stage (around April 2022) why the respondent withdrew his offer. His work visa required a sponsorship licence, and the Home Office didn't have one. That is the same basis upon which he now wishes to bring this claim. That applied as much in December 2021 as it did in February 2021. He had that information at the time he presented his claim form, so it is not something which prevented him from including it at that time or applying for this amendment earlier.

29. On 3 May 2023, after the commencement of these proceedings the claimant asked the respondent's representative for information about whether the Home Office would sponsor certain roles or whether there was another requirement for commonwealth citizens. The respondent's legal representatives asked how that information was relevant to the issues in his claim, it being one of disability discrimination, and the claimant failed to provide that information.

30. The internal complaint to the respondent was rejected and the claimant was notified of this on 8 July 2022 and 25 July 2023. There was no further right of appeal. The claimant was reminded of this in the respondent' email to him dated 11 October 2023.

31. There is no doubt that the claimant suffers from ill health and that his disabilities make conducting proceedings challenging, but he was able to present a claim based upon his disabilities in June 2022 and provide instructions to a barrister to attend and explain his case at the preliminary hearing in April 2023.

32. Having considered each of the matters raised by the claimant, I consider there is no good explanation as to why this application was not made earlier in these proceedings, which is likely to impact upon his ability to show it would be just and equitable to extend time.

33. I also consider the merits of the case. The claimant puts this as an indirect discrimination claim, though it was identified by Employment Judge Dunlop as potentially also a direct discrimination complaint. I do not see merit in the complaint of direct discrimination, even on the claimant's own case. The claimant accepts that the reason the offer was withdrawn, and he was not later given the role was because the respondent did not have a sponsorship licence, not because of his race. There may be merit in the indirect discrimination complaint such that the respondent would need to show how it justifies its policy, but as the respondent is yet to plead its justification argument, I cannot say whether the claimant's complaint might succeed.

34. I have considered each of these factors when balancing the hardship caused to either party. I have also considered the overriding objective particularly in respect of proportionality and delay. There is a four-day hearing listed in May this year. No preparation has been undertaken in respect of disclosure, bundles or witness statements. The final hearing in this claim has already been postponed three times. Adding a new complaint at this stage will risk the

hearing in May not proceeding. There are no alternative dates available until 2026. By that time, we will be some five years from the race discrimination allegations and four years from the allegations which are the subject of the disability discrimination claims. Those later allegations involve very specific allegations made by the claimant about what was said and heard at his interview. Any delay is prejudicial to those witnesses, and it is not in the interests of justice for there to be a further delay in that evidence being heard.

35. An indirect discrimination claim will involve additional gathering of evidence, work and cost. Although there may not be forensic prejudice as the indirect discrimination claim would involve consideration of a policy which is applied, it is a significant issue for the respondent to have to defend. If it is a policy decision across the Home Office, consideration would need to given to who is impacted, the legitimate aim, and how that is achieved. An amended response would need to be filed. It would take time and resource. It would clearly cause hardship to the respondent to have to do that in a period of three or four months prior to a final hearing, and there is a clear risk that could not be achieved.

36. I have to consider all of these issues and weight up where the balance of hardship falls. The claimant may have the basis of an indirect discrimination claim but there is no good reason why he didn't bring that claim at the outset or at a much earlier stage in these proceedings. The hardship to the claimant in not being able to pursue a race discrimination complaint is therefore limited in view of the problems he may face at the final hearing, particularly in respect of time.

37. If I permit the amendment now, in addition to the matters I have identified above, there is significant hardship to the respondent in requiring them to prepare for a complaint that has only been clarified in recent months. Bearing in mind the lack of progress in getting the existing claim ready for final hearing in May, the strong likelihood is that is that if I permit the amendment, neither complaint will be ready, and the hearing will have to be vacated yet again. This is not in the interests of justice for either party, but I find that more hardship is caused to the respondent. As such the amendment application is not granted.

38. I apologise of the delay in these reasons being produced, which has been caused by hearings on other parties' claims, other judicial business and annual leave.

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Employment Judge Benson

28 May 2025

REASONS SENT TO THE PARTIES ON

3 June 2025

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FOR THE TRIBUNAL OFFICE

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