EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001205/2024 (V)

Held on 5 November 2024

Employment Judge J M Hendry

Mr R Bialonski	**Claimant** **In Person**
National Oilwell Varco UK Limited	**Respondent** **Represented by,** **Mr M Pollak,** **Solicitor &** **Miss L Skelly,** **HR Observer**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application to amend to include a claim for perceived race discrimination is refused.

REASONS

1. The claimant in his ET1 sought findings that he had been unfairly (constructively) dismissed from his employment. He had completed the ET1 form himself. He had been employed as a Senior Design Engineer by the respondent company for some years.

2. The claimant resigned on 29 May with notice and his employment terminated on 21 June. The claimant took part in early conciliation on 25 June 2024. An ACAS Certificate was issued on 1 August 2024. His claim was lodged on 9 August 2024. These matters were not in dispute.

The Respondents

3. The claimant in the narrative of his claim criticised the respondent's Managers' attitudes towards him alleging that he was intimidated and threatened by them.

4. The claims are resisted by NOV. They denied that the respondent's Managers' actions were intended to punish the claimant or that they had not acted reasonably throughout in their dealings with him.

5. The case was due to proceed to a case management hearing on 5 November 2024. On 29 September the claimant sent the Tribunal a list of files containing a list of documents in relation to his claim. He also wrote seeking to amend his claim:

"*I am writing to formally request permission to amend my ET1 form which was submitted in relation to my Employment Tribunal Claim against National Oilwell Varco (NOV). After further review and collection of evidence, it has become clear that my treatment by NOV is linked to discrimination based on my perceived status as a foreigner or outsider within the company.*

Whilst this discrimination is not directly related to my specific nationality, it has rooted my national origin and the perception that I was not part of the internal group within the company. I believe that this unfair treatment, which includes inclusion from team activities, mishandling of holiday requests, and the bias handling of the grievance and appeal processes, forms a valid basis for an amended claim of discrimination.

I attach this letter as the addition to my original submission outlining the argument for discrimination based on my outsider/foreigner status which I respectfully request be included as part of my case."

6. The claimant in a separate document sets out his amendment. He indicated that he was treated as an outsider. He had been excluded from decision making and that there was a perception "*that I was a foreigner or not part of the established group*". The statement said that he was treated as expendable and alleged that there had been indirect discrimination and systemic bias and there had been preferential treatment given to the group that he described as "*insiders*".

7. The respondent company lodged detailed objections to the application. They made reference to the case of ***Selkent Bus Co. Ltd v. Moore*** and then set out their submissions on the nature of the amendment, applicability of time limits, timing and manner of the application, the stage at which the application had been made and the likelihood of delay and additional expense. They emphasised that the matter was one for the discretion of the Tribunal.

8. It appears that the claimant lodged an amended ET1 form and the respondent's agents pointed out that the claimant could not institute new proceedings with claims for discrimination without going through the ACAS process. However, they accepted that the claimant could seek to amend the existing competent process. They then set out what they believed would be the injustice and hardship to the respondent, the substantial amount of time and associated expense that adding a discrimination claim would entail.

9. At the outset of the hearing, I explained to the claimant the purpose of the hearing and broadly what was involved in an application to amend. I wanted to understand the claimant's position, recognising that as a non-lawyer, he might not have set out his position as accurately as he might have done if he had taken legal advice in drafting it.

10. I would add that the claimant had taken the time to respond in detail to the respondent's written objections. He disputed that there was a substantial alteration to the case suggesting that the facts, events and witnesses remain unchanged and it is simply a question of viewing the facts through the "lens"

of the applicable discrimination laws. The position was that there were good reasons for the amendment and the balance of hardship was in granting it.

11. The claimant also wrote:

"*After discussions with Unite the Union and legal Counsel, I was led to believe that, as a white male, catholic, straight individual I could not be subject to discrimination under the Equality Act 2010 particularly as there was no overt racial slurs or derogatory terms directed at me.*"

12. As noted earlier I was keen to understand the claimant's claim and in particular why he had framed it as race discrimination by perception. I briefly explained what was involved in a claim for direct race discrimination. I cautioned him that unreasonable behaviour on the part of the employer was not enough and that there had to be something more that gave the suggestion or inference of race discrimination.

13. I rehearsed what I understood to be his position namely, that he'd been treated differently, and less favourably, than the "insiders" who he confirmed were all Scottish/British Managers. The claimant is Polish by nationality and has a Polish surname. I suggested to him that contrary to what he was saying this did on the face of it appear to be a claim for direct discrimination on the grounds of his nationality. I posed the question to him that it looked as if he was actually saying that he was treated less favourably because he was Polish. He remained convinced that the claim was for perceived discrimination.

14. I explained that I struggled with the fact that he had in his papers stated that he was not pursuing a claim for direct discrimination rather one for perceived race discrimination. I made reference to the case of ***Coffey*** which was mentioned by him and explained my understanding of the facts that had given rise to the claim for perceived discrimination there. I gave as an example of perceived race discrimination someone who was thought of, wrongly, as belonging a particular nationality and who suffered discrimination because of

that wrongly perceived nationality. I also discussed with him the form of the amendment and whether there were any additional matters he could point to that might give an indication that the Managers were acting in a racially discriminatory way towards him other than in an unreasonable fashion as he contended.

15. We discussed the respondent's objections. I challenged Mr Pollak to explain why the case would be more expensive and time consuming if a race discrimination claim was allowed to proceed as the Managers who were involved in these events are the same Managers who the claimant is accusing of discrimination. Mr Pollak pointed to the additional layer of complexity. He would have to take statements from these Managers and examine them in relation to their practices and views. He might have to call additional witnesses given that the claimant had called into question the probity of the HR Department and management in general. It was also clear that a claim for race discrimination would be out of time and the granting of dispensation under Section 123 of the Equality Act was 'the exception rather than the rule'' There was no good reason why this claim could not have been brought at the start.

16. I questioned the claimant on his knowledge of employment matters. He worked for the respondent for some years. He was proficient in English and although not knowledgeable about employment law practices he was able to carry out some research in order to raise proceedings on his own. He explained that he had joined the Union, Unite but they were unable to help him because the events he was complaining about occurred before him becoming a Union member. He had also at this point spoken to his solicitor and felt he had not been given incorrect advice by the Union and the solicitor. In his view there was no prejudice to the respondent. He had lodged the claim as soon as he had started putting together the paperwork for his dismissal claim and had taken the opportunity of reconsidering the events he was complaining about.

17. He took me through the circumstances of his resignation. It was the beginning of January, early February and he was trying to get help with the situation at work. In mid February he joined Unite. At work matters were moved on to a disciplinary meeting and a PIP. He lodged a grievance about the way in which he had been treated which was not properly dealt with. The grievance was refused and he appealed. He didn't think the appeal manager had anything to do with the Managers who were subject to the grievance but he later discovered on LinkedIn that they were possibly known to each other. This deepened his suspicions of a cover up. His view is that the Appeal Manager was picked deliberately.

Decision

18. The Tribunal has wide powers of amendment and this includes allowing an amendment that brings in a claim that is otherwise out of time.

19. The starting point is the leading authority of ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836. The approach set out there has since been affirmed by the Court of Appeal, for instance in ***Hammersmith and Fulham London Borough Council v Jesuthasan*** [1998] ICR 640.

20. In ***Selkent***, the EAT confirmed that the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

21. While the court observed that it was impossible and undesirable to attempt to list all the circumstances the EAT considered that the following to be relevant:

    (a) The nature of the amendment which can cover a variety of matters such as:
        i) The correction of clerical and typing errors;

ii) The additions of factual details to existing allegations;

iii) The addition or substitution of other labels for facts already pleaded; or

iv) The making of entirely new factual allegations, which change the basis of the existing claim.

(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 under the applicable statutory provisions.

(c) The timing and manner of the application – it is relevant to consider why the application was not made earlier and why it is now being made: e.g. the discovery of new facts or new information appearing from documents disclosed on discovery.

22. In the present case the claimant faces a number of difficulties. The first is the nature or form of the amendment. The behaviour the claimant is describing does not appear to be discrimination by perception. He was aware of the case of ***Chief Constable of Norfolk v Coffey***. Although the Equality Act does not refer to discrimination by perception it is an established prohibited type of conduct. In that case Underhill LJ offers a simple definition namely where A discriminates against B because he thinks that they have a particular protected characteristic when they do not. This is not what the claimant is saying in his amendment. Being an outsider is not a protected characteristic.

23. Because of the way the claimant has proceeded the amendment does not link the behaviour complained of to race discrimination. Even if I was to accept that the amendment was in reality an amendment to bring in facts capable of being direct race discrimination, and this is not what he is arguing, then it faces other difficulties. The facts/circumstances of being treated as an outsider were known to the claimant at the time he raised proceedings. I find it difficult to accept that a Trade Union and let alone a

solicitor would tell him that he could not be discriminated against. I suspect that the advice may have been misconstrued but in any event it must be apparent that someone could be discriminated against because of their faith or nationality and so on.

24. The claimant is an able and intelligent person who has access to the internet and the advice on employment matters that can be obtained there. I am not convinced that there is a good reason why the claim for race discrimination in some form wasn't made at the outset.

25. This impacts of the possible exercise of discretion and I accept the thrust of Mr Pollak's argument that a new claim for race discrimination would add to the complexity of the case and be likely to incur the company in additional expenses in defending such a claim.

26. Looking at the matter in the round I am not convinced that it would be appropriate for the Tribunal to allow the new claim out of time and the application is refused.

Employment Judge: J M Hendry

Date of Judgment: 8 November 2024

Date sent to Parties: 11 November 2024