Neutral Citation Number: [2022] EAT 146

Case No: EA-2021-000314-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 & 27 June 2022

Before :

JOHN BOWERS KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MR R EDEMA	**Appellant**
- v -	
CITY OF SANCTUARY SHEFFIELD	**Respondent**

- -
- -

Trevor Browne for the **Appellant**
Kara Loraine (instructed by **Capsticks LLP)** for the **Respondent**

Hearing date: 23 & 27 June 2022

- -

JUDGMENT

SUMMARY

Jurisdictional/Time Points

The original claim was brought in respect of a discriminatory dismissal. In what were purported to be further information, the claimant made 62 new allegations which were individual incidents in the lead up to dismissal. The EJ refused an application to amend the claim. The appeal was brought on the basis that the EJ mistakenly considered these to be new claims when they were really new factual allegations within the original claim, the Appellant had a "legitimate expectation" these allegations would be allowed because of the phrasing of an earlier order and that the EJ improperly addressed the time point and thought it was a "skilled" adviser case. The EAT upheld the EJ's decision on the basis that there was no error of law.

JOHN BOWERS KC, DEPUTY JUDGE OF THE HIGH COURT

Introduction:

1. This case had a tangled procedural history even before it came before Employment Judge Little on 21 January 2021, sitting at Leeds Employment Tribunal, in the decision from which this appeal was brought. The necessary history is as follows:

> 1) The claimant's application to the employment tribunal was brought on 24 July 2020 (page 44- 50). At that time, he was represented by Mr Hiles, a union officer. The original claim was solely brought in respect of his dismissal save for one additional allegation that earlier he had been rejected for the post of director. It was very much a homemade pleading.
>
> 2) On 30 September 2020, the claimant was ordered to provide factual details by Employment Judge Shore. There was a wide-ranging telephone preliminary hearing before him, and I will need to consider the true import of the order made there. The judge recorded that there were "four possible claims that can be brought for race discrimination" and he ordered further information but was careful to isolate "a list of factual allegations that the claimant must give further information about", numbering ten, taken from the claim form and all related to dismissal. Mr Browne particularly relies on paragraph 51 of the order where he talks about the "allegations of race discrimination that he says started in the last three years of his employment and which culminated in his being coerced into taking voluntary redundancy". Mr Browne for the appellant says that this was a recognition that the complaint was all along of continuing acts and this gave a legitimate expectation to the claimant that amendments would be given permission for in due course. He also points to the template which the appellant was ordered to populate, which included under "direct race discrimination" at paragraph 4.2, "Did the R do the following things: 4.2.1 [details]." He says that this was a recognition that the claimant would be allowed to rely on a whole series of facts

such as were put forward in the application to amend.

3) On 21 October 2020, the claimant put forward further particulars which are somewhat difficult to follow, and the claimant was, on 2 November 2020, ordered to comply with the original order of Employment Judge Shore.

4) On 19 November 2020, the claimant told the employment tribunal he had disinstructed Mr Hiles and, until just before this hearing, he was unrepresented.

5) On 23 November 2020, the claimant sent further information, and, on the following day, the employment tribunal rejected this as noncompliant. Without being asked to do so, the claimant provided a further document of further information and a document entitled, "Further identification of claims", which contained 62 allegations of direct race discrimination/harassment and also a new allegation of indirect discrimination (pages 207-222). These are clear and detailed and some also claim repudiation of contract.

6) Following the order dated 14 October 2021 of HHJ Tayler allowing the appeal to go to a full hearing, these 62 were slimmed down to 49 allegations. I refer to two of them taken at random as examples. Paragraph 48:

> "**25th March 2020 -**. Mr Martin set yet further deadlines for the Claimant and advised the Claimant as follows: *"We have set new deadlines for a couple of the tasks and added one new task. As I said in the meeting, you need to keep to the deadlines we set and if you are struggling to meet this deadline you need to let me know before the deadline that you are struggling."*
>
> [That is said to be] Less favourable treatment based on race/harassment."

Number 3:

> "**At 4.18 pm on 17 July 2017,** the Respondent Sarah Eldridge, confirmed Ms Jan Thompson's appointment to the post of Respondent centre manager. Ms Jan Thompson is white and British.
>
> [And this is said to be] Less favourable treatment based on race/ Repudiatory breach of an implied contractual term." (original emphasis)

7) On 18 January 2021, the claimant made a formal application to amend, which

was heard by Employment Judge Maidment in due course (page 185).

The Issues Before Me

2. The amendment sought to set out a series of separate racially discriminatory incidents which the claimant says culminated in dismissal, and I have read out two of the particulars. I record, because it is important, that there is no dispute between counsel that these incidents can be referred to in evidence at a final hearing as matters from which an inference of discrimination might be drawn, subject only to the ability of the respondent to claim that it is disproportionate for the tribunal to consider them all. What is in issue before me is only the question of whether the claim should be amended to allow them to be taken as separate acts of discrimination for which separate awards of compensation may be made or, more accurately, in relation to the jurisdiction of the EAT, whether the decision of the judge refusing this contains an error of law.

3. The essence of the appellant's contentions is that the employment judge wrongly considered the nature of the amendment as raising a new claim or cause of action (as opposed to the addition of new factual allegations to matters already pleaded) and that he accordingly assessed the appellant's application on the wrong basis. It is said that the judge accordingly acted on an erroneous view of the nature and extent of the appellant's application.

Legal Principles

The Powers of the EAT

4. The jurisdiction of the EAT is limited to questions of law: eg **British Telecommunications Plc v Sheridan** [1990] IRLR 27, CA, paragraph 35; **Brent London Borough Council v Fuller** [2011] ICR 806.

5. Mr Browne relied on paragraphs 83, 84, 90-93 of **Galilee v Commissioner of Police of the Metropolis** [2018] ICR 634, where it is said:

> "83. More recently, in *Kuznetsov v Royal Bank of Scotland* [2017] EWCA Cp Rep 18 the Court of Appeal refused to interfere with the rejection by the employment tribunal of an application for permission to amend a claim. Elias LJ, giving the judgment of the court, said: [This at paragraphs 18 to 20]:

> 18…. I will summarise the relevant and undisputed legal principles in issue in this case.
>
> 19. First, employment tribunals have a broad discretion in the exercise of case management powers and the appellate courts will not interfere unless there is an error of law or the decision is perverse: ... Errors of law include failing to take into account relevant considerations and having regard to irrelevant ones.
>
> 20. Second, in the case of the exercise of discretion for applications to amend, a tribunal should take into account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it: see the observations of Mummery J… [as he then was] in *Selkent Bus Co Ltd v Moore* [1996] ICR 836. Factors to be taken into consideration include the nature of the amendment, so that for example an amendment which changed the basis of an existing claim will be more di-cult to justify than an amendment which essentially places a new label on already pleaded facts; the question whether the claim is out of time and if so, whether time should be extended under the applicable statutory provision; and the extent of any delay and the reasons for it. …
>
> 84. But experience on this and other appeals suggests to me there may be developing an undesirable tendency to regard case management decisions as being in a special category or that the fact the discretion can properly be described as a broad discretionrenders its exercise immune from scrutiny. I am content that is not what either Mummery LJ or Elias LJ intended by the above remarks. ..."

6. Further, at paragraphs 91 and 92, Judge Hand QC said in **Galilee**:

> "91. These all emphasise that misdirection as to law, perversity, consideration of the irrelevant and lack of consideration of the relevant are just as much a basis for interference as concluding that the decision was plainly wrong.
>
> 92. In deciding whether a decision to give or refuse permission to amend was erroneous, I recognise that there is a broad discretion vested in the employment tribunal. But that does not mean the exercise of a broad discretion, particularly when it arises in a case management context, such as a decision about amendment, must be regarded as inviolate ."

7. I was also referred to **Adams & Raynor v West Sussex County Council** [1990] IRLR 217 at paragraph 16 and **Abercrombie & Ors v Aga Rangemaster Ltd** [2013] IRLR 962 at paragraph 49.

8. Secondly, Mr Browne says that the leading authority in relation to applications to amend remains **Selkent**, which was recently considered with a helpful analysis of the authorities in **Vaughan v Modality Partnership** [2021] ICR 535 at paragraphs 6-28.

9. Thirdly, I also bear in mind the important point that allegations of unlawful discrimination are notoriously difficult to prove and also that tribunal pleadings are not as rigid as in the civil courts. The question here is whether they need to be pleaded as separate heads of claim.

Grounds 1 and 2

10. I can take grounds 1 and 2 together, although they emphasise different aspects of what is essentially the same point. In his clear skeleton argument and address to the court, Mr Browne submitted firstly that the employment judge failed to take any or any adequate account of the claimant's legitimate expectation or otherwise arising from the tribunal's own orders and directions commencing from the first preliminary hearing. I think legitimate expectation is an incorrect way to describe what arose from Employment Judge Shore's order, but I can understand that, if paragraph 51 at page 77 of his order were to be read alone, there is a description of the claim as involving a period of events which may have caused the appellant to think that his application to amend would succeed and that really, he was being asked to give further information about a claim already in being. However, paragraph 51 is not to be read on its own because, as Ms Loraine showed in argument, this paragraph was subject to paragraph 15, which clearly limited the issues, at least on a provisional basis, which were before the employment tribunal to those of dismissal and one other matter.

11. Mr Browne complained about the employment judge's conclusion that the appellant was seeking to add new causes of action when in fact he argued that he was not and he argued that this formed a crucial part of his reasoning and that, in doing so, he failed to explain why he discounted relevant parts of the tribunal's own orders. On a proper construction, I do not think the employment judge was misconstruing the former orders as they were predicated on the issues relating to dismissal only.

12. Mr Browne also said the employment judge failed to distinguish between and/or identify

"factual allegations" which:

i) did not alter the existing basis of the claim or, if it did so, did not raise new distinct heads of complaint; and

ii) any proposed new allegations or cause of action which arguably did raise a new distinct head of complaint but were nonetheless closely connected, or directly connected, to the claimant's discrimination claim.

He is correct that in **Selkent** the Court of Appeal said that a judge should be alive to what was the nature of the amendments. I think the employment judge was here alive to the fact that the new allegations went beyond the scope of the claim form, which was limited save in one respect to dismissal, and sought to claim compensation for a series of acts of discrimination. I was taken to **Pruzhanskaya v International Trade Exhibitors** UKEAT/0046/18/LA, but that is a wholly different case as it was merely putting forward in an unfair dismissal case another potential reason for dismissal.

13. As to whether there were new claims or causes of action, the point is:

a) the amendment would take the claim well outside the realms of dismissal;

b) those factual allegations may be given in evidence in any event and the appellant can ask for inferences to be drawn from them whether or not they are treated as claims in themselves.

Ground 3

14. This relates to the way Employment Judge Little considered the issue of the time bar. Mr Browne says that he failed to consider whether any or all of the appellant's proposed amendments were out of time. He contends that the judge failed to note that the proposed amending facts were part of a continuing situation culminating in the appellant's dismissal. The appellant relies on the judgment of Underhill in **Abercrombie** at paragraph 50 in particular. He says:

> "There was no new complaint or cause of action sought; therefore the issue as to whether or not the amendment sought was barred by time did not arise under the ***Selkent*** principles." (original emphasis)

15. A time point is indeed a relevant issue under **Selkent**, although how important it is depends on the nature of the case. The employment judge does not have to make a finding as he would if considering whether a claim was actually time-barred but has to reach a general view as to its impact on the amendments to weigh in the exercise of discretion.

16. Mr Browne says that the employment judge neither made a definitive determination on time unqualified, nor on time within the continuing course of conduct context. I think the employment judge, pursuant to the **Selkent** principle, had to and did reach a general view on time. The employment judge properly considered the issue of time limits in that he did not conclude that the proposed amendment was in fact wholly out of time, only that in large part it could be found to be, and he correctly identified that time limits in themselves were only one factor to determine.

17. I express some surprise that the Judge put so much attention on the fact that Ms Eldridge had retired in 2019, but I do not think this vitiates his exercise of the discretion. On the other hand, I would also be surprised, on what I know at present, if a tribunal would consider the individual pleaded issues to be an act extending over a period. But I think the real question here is not what I think but whether the decision of Employment Judge Little on this point was, as a whole, perverse or demonstrative of a legal error. I do not consider it was, applying the high burden for that rubric, nor do I see any misapplication of the law.

Ground 4

18. Ground 4 is that the judge erred in holding that the appellant had the benefit of a "skilled adviser" and accordingly should have set out all matters upon which he sought to rely at the initial presentation of his claim. I can take this shortly as I think the argument that an experienced judge like Employment Judge Little somehow stumbled by this into confusing the issues on presentation of the claim as set out in **Dedman v British Building and Engineering Appliances Ltd** [1974] 1 All ER 520 at 526 with amendment to be somewhat fanciful. I think he was merely saying that, at the time, the claimant had the benefit of an adviser who was somewhat skilled in this area. He also

coupled with this the appellant's own educational qualification.

19. In this regard, I adopt **Brent London Borough Council v Fuller**, where the Court of Appeal said:

> *'The reading of an employment tribunal decision must not ... be so fussy that it produces pernickety critiques ... focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid.'*

20. I think Mr Browne, although the argument is ingenious, is really focusing on a particular term of phrase which was not intended to convey the issue that he suggests.

Ground 5

21. I come finally to the suggestion that the discretion was improperly exercised. Employment Judge Little set out a clear account of the procedural background of the case and then, at paragraphs 4.5-4.7, enunciated his approach to the exercise of discretion as follows:

> ***"4.5. I have a discretion as to whether to permit an amendment. That discretion must be exercised judicially ... Overall, I need to balance the hardship and injustice between the parties, analysing those matters on the basis of if the amendment is granted and if the amendment is refused.***
>
> ***4.6. The first matter that I have considered is the nature of the amendment sought. As noted above the claimant seeks to put an entirely new set of factual allegations before the Tribunal. Accordingly a significant and extensive amendment is sought.***
>
> ***4.7. I have also considered the question of the time limits. Whilst there is no time limit for making an application to amend, if a new claim or cause of action is proposed to be added by way of an amendment it is necessary to consider whether that claim or cause of action is out of time or may be found to be so. The claimant does appear to be adding new causes of action, as in addition to alleged race discrimination (which seemed the most obvious type of complaint in respect of his dismissal), the claimant is now also alleging that there was indirect discrimination and harassment. It appears that much of the proposed amendment could be regarded as out of time in circumstances where the claimant is going as far back as 2016. Whilst the claimant might contend that there had been discrimination because of a continuing cause of action, it appears that the allegations of discrimination are by various individuals at the respondent. A significant number of the allegations are brought against Ms S Eldridge ...*** (original emphasis)***"***

22. I agree with Ms Loraine, who in her skeleton says:

> "Correctly, focused on the balance of injustice and hardship based upon a consideration of the practical effect of allowing or refusing the amendment as encouraged in *Vaughan*. The predominant factor pointing against the granting of the amendment was clearly **the vast addition of new factual allegations, rather than the legal labels attached to them, and the fact that they related in very large part to historic allegations which might well be out of time.**" (original emphasis)

23. I think that these factors were appropriately taken into account and balanced and that paragraph 4.10 was a perfectly appropriate conclusion. The claimant, although no doubt disappointed in this decision, can take comfort from the fact that:

a) as the judge says in paragraph 4.10, he has still a significant claim for unfair dismissal and discrimination (and I wonder whether, even if the additional facts were proved, they would give rise to much by way of additional compensation); and

b) he can rely on the individual allegations as raising inferences that the dismissal and non-appointment as director were not discrimination.

In other words, they are background material from which inferences may be drawn but not separate allegations.

24. In summary, I see no error of law in the decision of Employment Judge Little.

25. I would like to thank counsel for their valuable assistance, both in writing and orally.