Appeal No. UKEAT/0147/20/BA (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 06 November 2020
Judgment Handed down on 09 November 2020

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

MRS G VAUGHAN APPELLANT

MODALITY PARTNERSHIP RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOE SYKES (Advocate) Equity Law Solicitors 11 Peckham High Street Peckham London SE15 5EB
For the Respondent	MR GHAZALEH REZAIE (of Counsel) Instructed by: Messrs Brabners Chaffe Street 7-8 Chapel Street Preston PR1 8AN

SUMMARY

PRACTICE AND PROCEDURE

WHISTLEBLOWING, PROTECTED DISCLOSURES

This judgment may serve as another reminder that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequence of allowing or refusing the amendment. If they do not do so, it will be much more difficult for them to criticise the Employment Judge for failing to conduct the balancing exercise properly.

The balancing exercise is fundamental. The **Selkent** factors should not be treated as if they are a list to be checked off.

An Employment Judge may need to take a more inquisitorial approach when dealing with litigants in person.

In this case the Employment Judge had not erred in law in refusing the amendment.

HIS HONOUR JUDGE JAMES TAYLER

1. This appeal concerns the correct approach to adopt when considering an application to amend. It might be said that everything that needs to be said about amendment has already been said. That is probably true, but some statements of law are so often repeated that it is easy to stop thinking about what the words mean and to assume that repeating them is the same thing as applying them.

2. This is an error that both representatives and judges should avoid. Familiar authorities are such because they make important points. They deserve to be reread and thought about, rather than becoming so familiar that they are overlooked.

3. Mummery LJ noted in **Brent LBC v Fuller** [2011] ICR 806 CA, at paragraph 30:

> **"Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the tribunal, but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable."**

4. Determining applications to amend is a core component of case management. As with all case management decisions the Employment Judge has a broad discretion. The Employment Appeal Tribunal will not interfere with case management unless it is clear that the Employment Tribunal has made an error of law.

5. Applications to amend are frequently decided at case management hearings, along with a multitude of other issues, in limited time. As Mummery LJ noted in **Gayle v Sandwell and West Birmingham Hospitals NHS Trust** [2011] IRLR 810, at paragraph 21:

> **"If the ETs are firm and fair in their management of cases pre-hearing and in the conduct of the hearing the EAT and this court should, wherever legally possible, back up their case management decisions and rulings."**

6. Mummery J, as he then was, commented in the context of appeals against decisions refusing applications to amend in **Selkent Bus Co Ltd v Moore** [1996] ICR 836 at 843B:

> **"On an appeal from such a refusal, the appellant would have a heavy burden to discharge. He would have to convince the appeal tribunal that the industrial tribunal had erred in legal principle in the exercise of the discretion, or had failed to take into account relevant considerations or had taken irrelevant factors into account, or that no reasonable tribunal, properly directing itself, could have refused the amendment: see Adams v West Sussex County Council [1990] ICR. 546."**

7. It will be difficult for a party, especially if represented, to criticise an Employment Judge for failing to take account of a factor that was not raised in argument.

8. In considering reasons for case management decisions, which often, necessarily, will be brief, the Employment Appeal Tribunal must be astute to avoid an excessively minute analysis. Mummery LJ warned in **Fuller** at paragraph 30:

> **"The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; 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."**

9. This passage is so often quoted that I have reminded myself that it is insufficient to quote it; I must think about it and avoid the pitfall of which Mummery LJ warns.

10. Nonetheless, if an Employment Judge has, on a fair reading of a judgment, failed to take account of a relevant matter or failed properly to apply the law, even if quoted in the judgment, it is necessary to interfere.

11. Sedley LJ succinctly stated at paragraph 26 of **Anya v University of Oxford** [2001] ICR 847:

> **"The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."**

12. The key test for considering amendments has its origin in the decision of the National Industrial Relations Court in **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650 at 657B-C:

> **"In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."**

13. No consideration of an application for amendment is complete without a reference to **Selkent**. It is so familiar that it is especially easy to quote it without reflecting on the core principle it elucidates. The key passage is at 843D:

> **"Whenever the discretion to grant an amendment is invoked, 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."**

14. Mummery J reiterated this point at 844B:

> **"Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment."**

15. The history and central importance of this test was analysed by Underhill P, as he then was, in the, unfortunately unreported, case of **Transport and General Workers Union v Safeway Stores Ltd** UKEAT/0092/07 (6 June 2007) in which he also concluded that on a correct reading of **Selkent** the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise.

16. The list that Mummery J gave in **Selken**t as examples of factors that may be relevant to an application to amend ("the **Selkent** factors") should not be taken as a checklist to be ticked off to determine the application, but are factors to take into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment. Mummery specifically stated he was not providing a checklist at 843F:

> **"What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively."**

17. This is not a new point. Underhill LJ returned to a consideration of **Selkent** in **Abercrombie and others v Aga Rangemaster Ltd** [2014] ICR 209 and noted at paragraph 47:

> **"It is perhaps worth emphasising that head (5)[1] of Mummery J's guidance in Selkent's case was not intended as prescribing some kind of a tick-box exercise. As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4)[2]."**

18. Representatives and Employment Judges would be well advised to keep copies of **Safeway** and **Abercrombie** in their files of key authorities together with the ubiquitous copy of **Selkent**.

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[1] The *Selkent* factors.

[2] The balance of hardship and injustice.

19. Representatives often erroneously structure their submissions for applications to amend as if the **Selkent** factors were a checklist, without any or sufficient focus on the balance of hardship and injustice. If they do so, they will face an uphill battle in seeking to overturn a decision that adopts a similar structure. An Employment Judge may need to adopt a more inquisitorial approach when dealing with a litigant in person.

20. In **Abercrombie** Underhill LJ went on to state this important consideration, at paragraph 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 formal classification but on the extent to which the 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."**

21. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the **Selkent** factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis 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. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.

22. Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later.

23. As every employment lawyer knows the **Selkent** factors are: the nature of the amendment, the applicability of time limits and the timing and manner of the application. The examples were given to assist in conducting the fundamental balancing exercise. They are not the only factors that may be relevant.

24. It is also important to consider the **Selkent** factors in the context of the balance of justice. For example:

24.1. A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.

24.2. An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

24.3. A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

25. No one factor is likely to be decisive. The balance of justice is always key.

26. Rather like Charles Darwin who, when pondering matrimony, wrote out the pros and cons, there is something to be said for a list. It may be helpful, metaphorically at least, to note any injustice that will be caused by allowing the amendment in one column and by refusing it in the other. A balancing exercise always requires express consideration of both sides of the ledger, both quantitively 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 cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice.

29. This appeal is against the decision of Employment Judge Ferguson sitting at London South. The claim had been listed for a final hearing due to start on 1 July 2019. There were claims for detriments done on the ground that the Claimant had made public interest disclosures

and automatically unfair dismissal for the reason, or principal reason, that the Claimant made protected disclosures.

30. Unfortunately, members were not available. A joint application for postponement was allowed. EJ Ferguson then engaged in case management. Mr Sykes for the Claimant applied to amend to add two further alleged protected disclosures. The application was refused. Written reasons were sent to the parties on 23 September 2020.

31. At paragraphs 2 to 4 EJ Ferguson set out the nature of the amendment and the circumstances in which the application had come to be made. At paragraphs 5 and 6 EJ Ferguson summarised the Claimant's application and at paragraph 7 the Respondent's objections to the application.

32. At paragraphs 8-10 EJ Ferguson considered the **Selkent** factors:

> **"8. I adopted the approach set out in Selkent Bus Co v Moore 1996 ICR 836. I considered that these were new complaints, namely that the detriments already pleaded and/or the dismissal were motivated by these additional alleged protected disclosures (either in addition to, or alternatively to, the disclosures already pleaded). This was not a relabelling exercise.**
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> **9. As for the time limits, I accepted that this is only one factor and is not determinative, but the complaints are substantially out of time and test under the ERA is one of reasonable practicability. No arguments had been put forward that it was not reasonably practicable to present these complaints in time. Mr Sykes was essentially saying that they were not thought about until completing the witness statements. That is not a good reason for the delay.**
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> **10. On the timing and manner of application, the Claimant has had ample opportunity before now to apply to amend the particulars of claim. There was a preliminary hearing on 6 August 2018 and further and better particulars provided after that. The Claimant gave no notice to the Respondent of this application until it was made orally on what was meant to be the first day of a four-day final hearing."**

33. EJ Ferguson referred to the balance of injustice and hardship at paragraph 11 in the following terms:

> **"Considering the balance of injustice and hardship, I took into account that the final hearing had to be postponed, unfortunately, until October 2020, so there would be time for the Respondent to respond. But that is not the only issue. There is some prejudice to the Respondent in that they were ready to proceed with the final hearing, and they would need to amend their grounds of resistance and witness statements if the amendment were allowed. Further, memories fade and the alleged protected disclosures were some 18 months ago. Every other factor above points towards refusing the application."**

34. The only other reference to the balance of injustice and hardship was in paragraph 7 which the Respondent accepted was a statement of the submission made on behalf of the Respondent, rather than the analysis of the Employment Judge:

> **"Further, there would be considerable prejudice to the Respondent in allowing the amendment. The witnesses would be expected to reconsider their memories of events that would have been fresher if the complaints had been presented in time. The prejudice to the Claimant was limited because she was relying on the same detriments as for the complaints already pleaded."**

35. The Claimant appealed by Notice of Appeal dated 21 October 2019. HHJ Stacey, as she then was, considered the matter under Rule 3(7) of the **Employment Appeal Tribunal Rules of Procedure** and by letter dated 9 March 2020 concluded that the Notice of Appeal disclosed no reasonable grounds for bringing the appeal.

36. The Claimant challenged the matter under Rule 3(10) of the **Employment Appeal Tribunal Rules of Procedure**. On 21 August 2020, HHJ Barklem permitted the appeal to proceed on slightly amended grounds.

37. The first ground is that EJ Ferguson failed to conduct the required exercising of balancing the hardship and injustice of allowing as against refusing the amendment, only considering whether hardship would be caused to the Respondent by the grant of the amendment and failing to give any consideration to the hardship or injustice that would be caused to the Claimant by refusing it. Mr Sykes argues that EJ Ferguson therefore erred in law in failing to apply the "paramount test" as it was called by Mummery J in **Selkent**.

38. Ms Rezaie contends that this is an over fastidious analysis of the Judgment. She contends that in the first sentence of paragraph 11 EJ Ferguson specifically referred to "considering the balance of hardship and injustice" which makes clear that she carried out the appropriate balancing exercise. She conceded that in paragraph 11 there is no express reference to the hardship that would be caused to the Claimant by refusing the amendment.

39. Ms Rezaie argues that the application was made orally by Mr Sykes and was not supported by evidence. She contends that Mr Sykes did not point to any specific prejudice to Claimant of refusing the amendment. She also contends in her skeleton argument that "The fact that the Appellant would be denied the opportunity of airing an issue before the Tribunal should the application be refused is a hardship that is true of every allegation which is the subject of an amendment application and is so obvious that even the Appellant's representative chose not to raise it before Employment Judge Ferguson."

40. Ms Rezaie contended that the potential prejudice to the Claimant in the general sense of not being able to rely on an issue that she wished to advance was so obvious that she had raised it herself as was recorded by EJ Ferguson at paragraph 7 where her submission was recorded as follows:

> **"The prejudice to the Claimant was limited because she was relying on the same detriments as for the complaints already pleaded."**

41. I have to say that I find the reasoning in the submission Ms Rezaie made to the Tribunal less than compelling. In all public interest disclosure cases the focus should not be on how many disclosures can be asserted and how many detriments can be alleged, but on which disclosure are likely to be shown to have given rise to a detriment. Litigants in public interest disclosure cases often feel with detriments and disclosures that the more the merrier, whereas

focus on the principal disclosures that may have resulted in detriment or dismissal is more likely to bear fruit. The fact that all relevant detriments are pleaded does not assist a claimant if the disclosure that resulted in them is not pleaded. However, Mr Sykes did not respond to this submission to the Tribunal by pointing to specific prejudice and explaining why these new proposed disclosures were of particular importance.

42. Paragraph 7 does demonstrate the issue of prejudice to the Claimant was referred to by the Respondent and the submission was noted by EJ Ferguson.

43. On balance, taking into account that this was a brief decision after a short application to amend, I consider there is just enough to persuade me that EJ Ferguson did conduct the balancing exercise. Even though EJ Ferguson at paragraph 7 was setting out the Respondent's submissions it did show that she had considered those submissions and the self-evident prejudice that the Respondent noted would arise from refusing the Claimant the amendment which necessarily included the fact that she would not be able to rely on the two new disclosures that she was seeking to advance. Mr Sykes did not make a submission to EJ Ferguson contending that any more specific prejudice would be suffered by the Claimant should the amendment be refused, such as, for example, it having become apparent on consideration of disclosure and/or the witness evidence for the Respondent that one of the new alleged disclosures was the one most likely to have been causative of the detriments or dismissal. If he had done so, and it had not been weighed in the balance at paragraph 11, I would have considered that it would be falling into the **Anya** error to seek out some reasoning in the judgment that simply was not there. However, no specific prejudice was advanced by Mr Sykes before the Tribunal. The reference to the prejudice to the Claimant at paragraph 7 together with the reference to "considering the balance of injustice and hardship" at paragraph 11 is just sufficient to persuade me that EJ Ferguson did not fail to carry out the balancing

exercise at all, or fail to give any consideration to prejudice to the Claimant, even if the reasoning would have benefited from being more detailed. Holding otherwise would be to fall into the **Fuller** error.

44. The second ground is that EJ Ferguson failed to consider 'the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old' as required by **Abercrombie**. I do not accept that is made out on a fair reading of the reasons. EJ Ferguson stated at paragraph 11 that the Respondent "would need to amend their grounds of resistance and witness statements if the amendment were allowed". She was not suggesting that this involved a substantial further factual enquiry and only referred to it causing "some prejudice". She noted that the postponement of the final hearing meant that there would be time to make the amendments. She considered that there would be some further factual enquiry required but did not suggest that it was major or that it was key to her decision to refuse the application. She considered it was more significant that the application to amend was made so late and that there would necessarily be some fading of memories. She did not suggest that she thought that further witnesses would be required, although Ms Rezaie informed me it has subsequently been established that one of the alleged disclosure was to a member of staff who has since left the employment of the Respondent. While the reference to memories fading is somewhat in the nature of supposition, Ms Rezaie had limited opportunity to take detailed instruction as the application was made so late. A lengthy delay will inevitably result in some fading of memory.

45. The third ground alleges that in considering the timing and manner of the amendment EJ Ferguson failed to consider relevant factors:

45.1. Mr Sykes relies on "the Claimant's identification of the two disclosures only on seeing late Respondent disclosure". Ms Rezaie states this submission was not made to EJ Ferguson. Mr Sykes did not dispute this. Indeed, it seems implausible that the

Claimant would only remember making important disclosures on seeing the Respondent's disclosure, as she surely would have remembered making the disclosure.

45.2. Mr Sykes referred to "taking into account her long private instructions to her solicitors" which suggests that there was a significant delay in acting on the Claimant's instructions. That is a matter between the Claimant and her advisors, not a reason to permit an amendment. The delay in making the application to amend points against permitting the amendment.

45.3. It is contended that "the Claimant's witness statement highlighted the additional two disclosures". If a party wishes to rely on important new grounds a timely application for amendment is required rather than merely including them in a witness statement. This was not a factor in favour of granting the amendment.

45.4. It is argued that "the Respondent had not objected to their inclusion following exchange". It was not incumbent on them to do so. The existence of a reference to the disclosures in the witness statement might limit the extent to which it could be claimed that the Respondent was taken by surprise by the allegations; however as the matter was to be postponed, EJ Ferguson had accepted that there would be an opportunity for instructions to be taken and for the Respondent to amend their response and witness statements.

45.5. It is alleged that EJ Ferguson failed to consider "the extent to which the amendment was late". EJ Ferguson considered the time limit and noted the more significant practical issue that "the alleged protected disclosures were some 18 months ago".

45.6. It is alleged that EJ Ferguson failed to consider "whether it was not reasonably practicable in the context of late disclosure to plead the two disclosures in time". Mr

Sykes did not allege before EJ Ferguson that it was not reasonably practicable to plead the disclosures earlier. The Claimant surely would have remembered making the disclosures. It appears that she had given instructions about them some time before the application to amend was made.

45.7. It is alleged that EJ Ferguson failed to consider "whether amendment put the trial fixture at risk". EJ Ferguson clearly did take into account at paragraph 11 the fact that the trial was to be postponed, irrespective of the application to amend.

45.8. It is contended that EJ Ferguson failed to consider the "the impact of trial postponement on timing and manner of amendment". I do not follow that ground. The postponement did not result in the late application to amend. At most it meant that the Respondent would have an opportunity to respond were the amendment granted, which was a factor that EJ Ferguson took into account.

46. In the fourth ground Mr Sykes contends that "The EJ erred in law in conducting a simplistic assessment of the non-hardship points as all pointing towards refusal of the amendment". EJ Ferguson permissibly concluded that the **Selkent** factors overall pointed against permitting the amendment, although the specifically noted that the postponement would allow time for amendment of the pleadings and witness statements.

47. Finally, in the fifth ground it is contended that EJ Ferguson "failed to consider alternative remedies to hardship the Respondent might suffer, if any, including whether costs could compensate the Respondent." Mr Sykes did not submit to EJ Ferguson that the Claimant would accept responsibility for any costs that might be incurred as a result of permitting the amendment. EJ Ferguson was also concerned about the effect of the fading of memories if an amendment made so late. That could not be ameliorated by costs.

48. If Mr Sykes had focussed in his submissions on the practical consequences of refusing the amendment with a more convincing explanation of why, if the new disclosures were so important to the claim, they had not been pleaded at the outset, or an application to amend had not been made sooner, his criticisms of EJ Ferguson for dealing briefly with the balance of justice would have carried much more weight.

49. I do not consider that Mr Sykes has established that EJ Ferguson erred in law in refusing the application to amend. She directed herself as to the relevant law, applied it on the basis of the submission made to her, and reached a permissible conclusion.