Neutral Citation Number: [2024] EAT 93

Case No: EA-2023-001164-DXA

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 May 2024

Before:

MATHEW GULLICK KC
DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MR MOHAMMED AYUB	**Appellant**
- and -	
MINISTRY OF DEFENCE	**Respondent**

- -
- -

MR M.A. SADIQ (the Appellant's Father) for the Appellant
MR N. FETTO KC (instructed by the Government Legal Department) for the Respondent

Hearing date: 17 May 2024

- -

JUDGMENT

SUMMARY

PRACTICE & PROCEDURE; RACE DISCRIMINATION

The Employment Tribunal materially erred in law when it refused an application to amend a race discrimination claim. It failed to take into account important elements of the explanation given by the claimant for the timing and context of his application to amend, including (1) the claimant's assertion of a link between the new matters and the allegations of discrimination already made in the claim, and (2) the claimant's explanation that one of the two new allegations had been made because of the recent disclosure of a relevant policy.

The appeal was allowed and the application to amend was remitted for reconsideration by a differently constituted Employment Tribunal.

MATHEW GULLICK KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. In this judgment I shall refer to the parties as "the claimant" and "the respondent", as they are before the Employment Tribunal.

2. This is the claimant's appeal against the decision of an Employment Tribunal sitting at Bury St Edmunds (Employment Judge Michell, sitting alone), made at a case management preliminary hearing on 29th September 2023, to refuse the claimant's application to amend his claim. The claim was at the time of that decision and remains listed for an eight-day final hearing in June 2024. This appeal, for which directions for a full hearing were given by Her Honour Judge Tucker at the sift stage, has been expedited so that a decision on it can be given in advance of the listed hearing date.

3. On this appeal the claimant has been represented by his father, Mr Sadiq, who is also a qualified solicitor, and the respondent has been represented by Mr Fetto KC. At the hearing in the Employment Tribunal which resulted in the decision under appeal, the claimant represented himself with the assistance of his father and Mr Fetto appeared for the respondent.

4. I should first of all address what is an unsatisfactory feature of this case, which is the lack on appeal of the written reasons for the Employment Tribunal's decision to refuse the application to amend. The application to amend and a number of other applications were listed for determination at the case management hearing on 29th September 2023. The Employment Judge determined the application to amend during the hearing and refused it, with reasons given orally. As I understand the position, at

no point did the Employment Judge mention to the claimant, who appeared as a litigant in person, the possibility of requesting full written reasons for the decision to refuse the amendment application under rule 62 of the Employment Tribunal Rules of Procedure.

5. The Employment Tribunal then issued a record of the hearing in a document containing two sections, one headed "Case Management Summary" setting out the history of the case and summarising the applications that had been made, and another headed "Orders", making a number of directions, including for the provision of further and better particulars by the claimant. Although the "Case Management Summary" refers in eight numbered paragraphs to the amendment application and to the decision made on it, it appears from what I am now told by Mr Fetto that the reasons given for refusing the amendment application in that part of the "Case Management Summary" are indeed only a summary of the more detailed reasons that had been given orally. Nor does the "Orders" section of the document issued by the Employment Tribunal contain an order to the effect that the application to amend was dismissed, although that this occurred is clear from the "Case Management Summary" and is agreed between the parties. Nor does the document contain a statement of the right to request full written reasons under rule 62 of the Employment Tribunal Rules of Procedure.

6. The result of this is that the claimant has pursued this appeal on the basis that the "Case Management Summary" contains, so far as he is concerned, the full and complete reasons given by the Employment Judge for refusing the amendment application and that nothing more than that was required. However, in his skeleton argument for the appeal, Mr Fetto made the point that the record of the decision in the

"Case Management Summary" was brief and that considerably more detailed oral reasons had been given at the hearing. He submitted in the skeleton argument that the claimant had not requested written reasons under rule 62 of the Employment Tribunal Rules of Procedure and indeed that it would be unsafe for the Employment Appeal Tribunal to interfere with the decision without knowing the full reasons for it.

7. Very properly, in an effort to assist the Employment Appeal Tribunal and the claimant, Mr Fetto (who was not, as I understand it, attended by his solicitor at the hearing in the Employment Tribunal) provided with his skeleton argument his own typed contemporaneous note of the hearing on 29th September 2023, including his note of the Employment Judge's more detailed oral reasons.

8. At the beginning of the hearing this morning, I asked Mr Fetto whether the respondent was maintaining an objection to the appeal being decided in the absence of the full written reasons for the decision to refuse the amendment application and whether, if it was doing so, I was being asked to dismiss the appeal because of that defect or whether I should adjourn the appeal and direct that written reasons be provided. Mr Fetto clarified that the respondent did not apply for the appeal to be dismissed for this reason or indeed for it to be adjourned for written reasons to be supplied. He submitted that the respondent did not wish to delay the appeal and was content for it to be decided on the basis of the reasons given by the Employment Judge in the "Case Management Summary" and, so long as they were not disputed, the contents of his note of the oral reasons. Mr Sadiq was similarly content for me to decide the appeal on this basis.

9. In the particular circumstances of this case, given that this appeal has been expedited for the reasons I have already set out and the parties have positively agreed upon this

course, it appears to me to be in the interests of justice and in accordance with the overriding objective to determine this appeal by doing the best that I can on the basis of the material now available to me.

Background to the Appeal

10. The claimant, who is of Pakistani origin and Muslim, was recruited into the Royal Air Force (RAF), joining in October 2020 and being discharged in March 2021. He applied to re-join the RAF in June 2021, but that application did not result in him re-joining.

11. The claimant's initial basic training in October and November 2020 was at RAF Halton with a view to becoming in due course a cyberspace communication specialist. In November 2020, the claimant was withdrawn from his mainstream training class ostensibly for medical reasons and was moved to a specialist training class for those with medical difficulties – where, the respondent says, the RAF was better able to manage his training in the light of the medical position.

12. Shortly afterwards, the claimant applied for voluntary withdrawal from the RAF unless he was reintegrated into his original class, but two weeks later rescinded that request. The claimant submitted a service complaint regarding his treatment.

13. In January 2021, after further medical tests, the claimant was invited to re-join a mainstream training class. However, as he had missed much of the scheduled training, this was not the class he had originally been placed into. In February 2021, the claimant failed an assessment and was put back into another training class for further training. The claimant then applied again for voluntary withdrawal from the RAF.

14. The claimant's case is that he attempted to and should have been permitted to rescind that request. In due course, however, the request was processed and he was discharged from the RAF in March 2021, although he only appears to have received notification of the discharge in April.

15. In the meantime, the claimant had submitted a claim to the Employment Tribunal on 28th February 2021 alleging direct race discrimination and direct religious discrimination in relation to a number of matters, including his movement between training classes, as well as a number of alleged acts of unlawful harassment and victimisation. The last alleged discriminatory acts in the claim form were said to have occurred on 26th February 2021, two days before it was filed.

16. In due course the claimant's claim was amended at a case management hearing in September 2022 to include allegations surrounding events relating to his discharge in March and April 2021, and a list of issues was prepared. At that point, the claimant did not apply to amend his claim to include any allegation concerning his application to re-join the RAF. The hearing was then listed for eight days to take place in June 2024, which at that point was 21 months away.

17. Following the disclosure of certain material to him by the respondent, on 1st May 2023 the claimant applied to further amend his claim. It is agreed that the text of some of the proposed amendments related solely to existing allegations. There were, however, two proposed amendments which introduced new allegations post-dating the claimant's discharge, which related to his attempt to re-join the RAF. These are at proposed paragraph 59B of the claimant's amended particulars of complaint, and read as follows:

> "The respondent's conduct towards the claimant was discriminatory because:
>
> a) The respondent delayed the progress of the claimant's application to re-join the RAF; and
>
> b) The respondent required the claimant to undergo a further fitness test which was not required of 'white' re-joiners in the same position as the claimant."

18. I will call these two allegations "the delay complaint" and "the fitness test complaint". It appears that before the Employment Judge at the hearing on 29th September 2023, those allegations were advanced as race discrimination claims only. During argument on the appeal, Mr Sadiq suggested that the claimant would wish to advance them as victimisation claims as well. That issue, as I said to Mr Sadiq in argument, is not before me today and if these claims do proceed, will be a matter for the Employment Tribunal to determine.

19. In relation to the fitness test complaint there are two particular documents which are of importance to this appeal. One is a document headed: "Pre Productive Re-Joiner Assessment Form", which appears at pages 6 to 11 of the appeal bundle. This is a proforma document which contains a number of details about the claimant that have been filled in by someone acting on behalf of the respondent – including, as Mr Sadiq pointed out, a number of records of the training which he received at RAF Halton. On the second page of that document, under the heading: "Candidate Process requirements", there are a number of statements with "Yes" and "No" tick boxes next to them. None of the boxes have been ticked. One set of "Yes" and "No" tick boxes apparently relates to whether there is a requirement to have a fitness test and is preceded by the text: "PJFT Required". The boxes "Yes" and "No" which appear next to that text have not, as with the similar boxes relevant to the other elements of the "Candidate Process requirements" section of the form, been ticked.

20. The other document of importance to this appeal is a policy apparently provided to the claimant by the respondent in March 2023 called "Previous & Current Service – Re-Joiners and Transferees" and which the claimant asserts ought to have been applied to him. That policy states at paragraph 38, according to the quotation in the appeal bundle, that:

> "…In summary, candidates will not be fitness tested during the selection process unless there is a prior history of fitness test failures and/or a poor attitude to physical fitness…"

The claimant says that he did not have any such prior history or poor attitude in relation to fitness tests and therefore that he ought not to have been fitness-tested during the re-joining process.

21. The respondent denies that this policy was in fact applied to the claimant or indeed even applicable to him, because it says that, in the particular circumstances of the claimant's service history, a different policy was applicable and that is the policy which was applied.

22. In relation to the fitness test complaint, the claimant says that he was told to take a fitness test as a condition of re-entry to the RAF. One was arranged for December 2021 but was cancelled at short notice. The claimant says that he was told the fitness test would be rearranged, but it never was.

23. In relation to the delay complaint, the claimant alleges that his application to re-join the RAF made in June 2021 was delayed for discriminatory reasons so that it had still not been completed by the end of December 2021. It appears that the application to re-join the RAF was never ultimately determined. That is something which the claimant says is the respondent's fault and which the respondent says is the claimant's

fault because he did not respond to requests that had been made of him during the application process.

24. In support of his application to amend his claim, the claimant provided a witness statement signed with a statement of truth and exhibiting various documents, including correspondence with the respondent's solicitor. That witness statement was dated 1st May 2023.

25. The claimant contends that the issues arising with his application to re-join the RAF were a continuation of the discrimination he allegedly suffered prior to his discharge. He contends that he was not able to include these allegations in his proposed amendments for the September 2022 preliminary hearing because he was lacking information which only became apparent following disclosure of documents by the respondent on 27th March 2023 (see paragraph 3 of the witness statement).

26. The respondent produced a written response to the claimant's application to amend, in the form of a letter dated 15th May 2023 from the solicitor with conduct of the case at the Government Legal Department. The claimant then responded in another letter dated 18th May 2023, containing a detailed response to each of the points made in the Government Legal Department's letter.

27. The claimant's witness statement and this correspondence was before the Employment Judge at the case management hearing on 29th September 2023. There was, I understand, a sizeable bundle of material covering several hundred pages.

28. The case management hearing took place remotely by Cloud Video Platform, with the claimant and his father attending and the respondent being represented by Mr Fetto. The claimant was not cross-examined on his witness statement; he made submissions

to the Employment Judge with some assistance from his father. Mr Fetto also made submissions. According to what I was told this morning and Mr Fetto's contemporaneous note, it appears that the hearing started at 10 a.m. with argument lasting approximately 90 minutes, following which the Employment Judge adjourned for approximately 25 minutes, giving judgment at about 12 p.m. There was then insufficient time to deal with the other applications that had been made, including an application by the respondent to strike out parts of the claim, which were adjourned to another case management hearing.

29. The Employment Judge's record of the reasons for his decision to refuse the amendment application in the "Case Management Summary" are at numbered paragraphs 10 to 17, under the section headed "Applications":

> "10. The parties agreed that there would not be sufficient time to deal with the strike out/deposit order application. And it transpired that there was insufficient time to deal with the specific disclosure application, either. Both of those will need to be determined at another preliminary hearing.
>
> 11. I heard from the parties in relation to the amendment application - which concerned allegations that the respondent had delayed the progress of the claimant's application to re-join the RAF, and had required him to undergo a further fitness test when not asking the same of white 're-joiners' in the same position as him.
>
> 12. For the reasons given orally at the hearing, I rejected the amendment application. Following given [sic] in cases such as **Selkent Bus Co v Moore** [1996] IRLR 661, it seemed to me that the application introduced new facts and new areas of inquiry as part of a new direct race discrimination claim. At least 2 additional individuals would be needed in order to give evidence for the respondent. To an extent at least, further documentation was required for introduction to the 1,500+ page bundle. The application was made at least a year out of time, in circumstances where I considered it ought to have been made much earlier (at the latest, by the time of the preliminary hearing in 2022). In particular, part of the allegations the claimant wanted to introduce (see para 59B(a) of the draft re-amended Statement of Complaint) related to 'discriminatory delay' on the part of the respondent. Any such delay would have been obvious enough at the time (and the claimant has

> already made allegations of discrimination in his claim in relation to other alleged delays on the respondent's part).
>
> 13. The claimant asserted that a document provided by the respondent to him in April 2023 revealed to him that (contrary to what the respondent had said) he did not need to undertake a fitness test as part of his application to re-join the RAF. But in fact, the document he showed me in the course of his submissions showed no such thing. Rather, it had a series of boxes showing options (e.g. need for fitness test) none of which was ticked.
>
> 14. The claimant said that his proposed white comparator, Sam Martin, apparently re-joined the RAF in early 2022 very shortly after having left. But he did not know if Mr Martin undertook a fitness test as part of that process. Moreover, the respondent now had no record of anybody by the name of Sam Martin having left and re-joined the RAF at the material time.
>
> 15. It seemed to me that, at least at first blush, the merits of the matters forming part of the proposed amendments were not strong.
>
> 16. Bearing all those factors in mind, given that a hearing date has already been set, and the very real danger that case would go part heard or have to be relisted if the new matters were introduced, I declined to allow the amendment.
>
> 17. I considered that the further directions I have given below would assist in making the next hearing as time–efficient as possible. The claimant's father was keen to ensure that claimant was still free to argue that the absence from the list of issues of the 'service complaint point' which is at the heart of the respondent's strike out application meant that the respondent could not now rely on that point. My directions are not intended to stymie any such argument. The strength of it can be considered by the judge dealing with the application."

The Appeal

30. The Grounds of Appeal permitted to proceed by Her Honour Judge Tucker are, in summary, as follows.

31. Under Ground 1, the claimant contends that the Employment Judge fell into error when he found that the claimant was in a position to amend his claim to include the fitness test complaint by early 2022. The claimant contends that he was not aware that the fitness test requirement was discriminatory until the disclosure of documents

in 2023 – and so his application was not, as the Employment Judge thought, late by a year or so.

32. Under Ground 2, the claimant contends that the Employment Judge failed to appreciate the import of the re-joiner assessment form disclosed to him in 2023 and specifically the boxes next to the entry "PJFT Required", to which I have referred. The claimant contends the Employment Judge fundamentally misunderstood his argument in relation to this document, the issue raised being that the respondent had failed to tick either "Yes" or "No" on that form in relation to whether there was a requirement to take a fitness test, but had nonetheless required the claimant to undergo a fitness test.

33. Also under Ground 2, the claimant contends the Employment Judge erred in law in finding the merits of his proposed amendments were "not strong", based on the explanations given in the correspondence by the Government Legal Department.

34. Under Ground 3, the claimant contends that the Employment Judge erred in law in finding that the application amounted to a new race discrimination claim. The claimant contends that the new claim was connected to the old on the basis that he alleges that the cause of the delay complaint and the fitness test complaint was ultimately acts or omissions on the part of staff at RAF Halton, where the claimant alleges that he had been discriminated against during his period of service.

Discussion

35. I heard submissions from Mr Sadiq and Mr Fetto during the course of this morning. I will address those submissions when dealing with particular Grounds of Appeal,

although for reasons which will become apparent, it is not necessary to address all of them in detail.

36. It is common ground that the Employment Judge correctly directed himself as to the law, applying the approach in *Selkent Bus Company v Moore* [1996] ICR 836. Further, as this Appeal Tribunal said in the case of *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132 at paragraph 30:

> "The power to grant or refuse an application to amend is a case management power. Once again, there is no specific provision, whether in statute or in rule, as to how those powers may or may not be exercised, or as to what may or may not be relevant considerations in a given case. Once again, all the relevant circumstances fall to be determined and weighed up by the tribunal. The overriding principle is that the tribunal must balance the hardship, justice or injustice to each of the parties that would be occasioned by either granting or refusing the amendment."

37. Equally, however, even a Tribunal which properly directs itself as to the principles of law which it should apply may fall into error in its application of that law to the particular circumstances of the case before it. In particular, a Tribunal may take into account irrelevant matters, fail to take into account relevant matters or come to a decision that is plainly wrong so that it must be regarded as outside the generous ambit of discretion entrusted to the Tribunal.

38. In my judgment, and notwithstanding the arguments raised by Mr Fetto, for reasons that materially affected its decision on both aspects of the amendment application, the Employment Tribunal in this case did err in law by failing to take into account relevant matters raised by the claimant when determining the application to amend.

39. In relation to Ground 1, in my judgment, the Employment Tribunal failed when addressing the claimant's argument that he had not been in a position to advance the fitness test allegation until March 2023, to take into account an important element of

that argument: namely, the claimant's contention that the policy which he says should have been applied to him stated (on the claimant's case) that he ought not to be required to undertake a fitness test.

40. The explanation given by the claimant for why he had only made the claim at the point in time which he did was not limited to the content of the re-joiner form referred to in the Employment Judge's reasons in the "Case Management Summary". In particular, at paragraph 3 of his witness statement dated 1st May 2023 the claimant, as I have indicated, said:

> "I was not able to include this aspect of the claim within the amended version of the statement of case filed before the CMC on 8th September 2022 because I was lacking information which only became apparent following disclosure of documents by the respondent on 27th March 2023".

41. Although no express reference to the particular documents is there given, the correspondence with the Government Legal Department then exhibited to the claimant's witness statement refers expressly and repeatedly to the terms of and the application of that policy. So does the claimant's reply to the Government Legal Department's response to his application to amend dated 18th May 2023, in which the claimant states:

> "It was not until disclosure of documents by the respondent that I became aware of RAF policy documents and the rules which expressly stated in writing that re-joiners are not required to re-do the fitness exercise".

42. The Employment Judge did not address the claimant's argument, which had been set out in writing, to this effect and in my judgment, this was a material error. I do not accept Mr Fetto's argument that because during the hearing the claimant took the Employment Judge to the re-joiner form and the "Yes/No" tick boxes, it was then sufficient for the Employment Judge to proceed on the basis that this was the only

relevant document. The claimant had quite clearly referred to the policy documents in his correspondence with the respondent and in his reply to the respondent's response to his amendment application, all of which were exhibited to his witness statement, which made this point at paragraph 3.

43. In my judgment, the Employment Judge approached his decision on the claimant's amendment application in this respect without determining the claimant's argument as set out in the application. This was, in my judgment, a failure material to the outcome of the application. The Employment Judge clearly regarded what he found to be significant delay on the part of the claimant in bringing this allegation as an important feature in the balance. Yet when addressing that delay and finding that the claimant could have made an allegation of discrimination in relation to the fitness test much earlier than he did, the Employment Judge did not, in my judgment, sufficiently address the claimant's argument about the terms of the respondent's policy which the claimant was relying upon to explain the delay.

44. I also consider, in relation to Ground 2, that there is merit in Mr Sadiq's criticism of the Employment Judge's assessment of the significance of the failure to tick the boxes relating to the fitness test on the re-joiner form. The point being made by the claimant was that it was of significance that he had been ordered to take the fitness test despite the relevant boxes on the form not being ticked. The issue to which the claimant's argument in this respect went was the apparent irregularity in the process of being ordered to take a fitness test despite the box in the re-joiner form not positively stating that he was required to do so, rather than the claimant's knowledge of the possibility of not taking a test – which derived from the disclosure of the policy.

45. In relation to Ground 3, in my judgment the Employment Judge's reasons, whether as set out in the "Case Management Summary" or as they appear in Mr Fetto's note, do not address the link which the claimant asserted existed between the new matters which he sought to introduce and his existing complaints as already pleaded. This was also, in my judgment, a material feature of the amendment application which the Employment Judge ought to have addressed. The claimant asserted in his witness statement that the new matters were part of a pattern of discrimination. As he put it, they were on his case, "a single event going back to the discrimination set out in the claim form".

46. In his submissions on the appeal, Mr Sadiq said that the claimant's application to re-join the RAF was dealt with by the respondent referring matters to and/or consulting with staff at RAF Halton, at which the claimant alleged the discrimination whilst he was serving had taken place. Mr Fetto's note of the hearing states that the claimant pointed out to the Employment Judge that material had been supplied by RAF Halton to the recruiting department during the re-joining process. Even if the Employment Judge was right to say that new facts and new areas of enquiry were engaged by the application to amend, in my judgment it was a material feature in relation to this amendment application that the claimant was asserting that the way in which his re-joining application had been dealt with was materially linked to the earlier alleged discrimination at RAF Halton which was already the subject of the proceedings. He was not, therefore, asserting that this was an entirely freestanding claim but instead that it was ongoing discrimination arising from and directly related to his earlier allegedly unlawful treatment.

47. The relevance of the claimant's argument that these new allegations were on this basis part of a wider pattern of discrimination linked to the existing allegations is not addressed in the Employment Judge's reasons in the "Case Management Summary" or in the note of the oral reasons provided by Mr Fetto. In my judgment, this was a material feature of the amendment application which the Employment Judge failed to take into account, and he thereby erred in law. The asserted link between the existing allegations and the new allegations is not addressed in the decision.

48. Those matters on their own are sufficient for this appeal to be allowed. I will, however, deal briefly with some of the other arguments raised by Mr Sadiq. I do not accept his argument that the Employment Judge was not entitled to have regard to the potential, asserted by the respondent, for further witnesses and documents to be required at the final hearing of the claim if the claimant's application to amend was allowed, or to the potential for the hearing going part-heard or having to be re-listed. Equally, as Mr Sadiq pointed out, those concerns on the part of the respondent were not particularised in great detail – but they were, in my judgment, certainly a matter to which the Employment Judge was entitled to have regard.

49. The Employment Judge was also entitled to take into account his assessment of the merits of the new allegations in reaching his decision; although he did not, I note, say that these claims had no realistic prospect of success. However, when reaching a view on the potential merits it is not apparent that he had regard to the claimant's arguments which I have already addressed earlier in this judgment, and which go to the merits of the new allegations as well.

50. Nor do I accept Mr Sadiq's criticism of the Employment Judge that he somehow took into account the respondent's undetermined strike-out application as a factor in his

assessment of the amendment application rather than dealing with the amendment application on its individual merits.

51. As to Mr Sadiq's criticism of the respondent's assertion of the complete absence of the alleged comparator from the respondent's records, that too was in my judgment a matter to which the Employment Judge was entitled to have regard. However, Mr Sadiq is right to point out that the respondent did not call evidence to that effect at the hearing, for example as to what searches had been carried out and in what level of detail, and had only raised the matter in correspondence. The Employment Judge ought, in my judgment, to have had regard to that feature when assessing the significance of the respondent's assertion in that correspondence.

Conclusion

52. For the reasons which I have given, I allow this appeal. Although Mr Sadiq urged me to substitute my own decision allowing the claimant's amendment application, in my judgment, applying the principles set out by the Court of Appeal in the case of *Jafri v Lincoln College* [2014] EWCA Civ 449, [2014] ICR 920, I am not in a position to do so. In addition, the respondent does not positively agree to the amendment application being redetermined by the Employment Appeal Tribunal at this hearing, where I do not have the benefit of the material before the Employment Judge – which extended far beyond that presently before me.

53. The consequence is that this amendment application will need to be remitted to the Employment Tribunal for redetermination. Having regard to the guidance given in *Sinclair Roche & Temperley v Heard* [2004] IRLR 763, in my judgment it is appropriate in this case that it is redetermined by a different Employment Judge, and I will so direct. What consequences that has on the future conduct of the claim in the

Employment Tribunal will be a matter for the parties and the Employment Tribunal to address.