EMPLOYMENT TRIBUNALS

Claimant: Ms S Nayak

Respondents: 1. Joe Smeeton
2. University of Salford

HELD AT: Manchester **ON:** 23 March 2017

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Mr J Seery, Solicitor
Respondents: Ms A Haddock, Solicitor

JUDGMENT

1. By consent all proceedings against the first respondent will be dismissed upon withdrawal with effect from **4.00pm on Friday 31 March 2017**, and without further order he will be removed from the proceedings pursuant to rule 34 at the same time, unless before that time the claimant has notified the Tribunal and the respondents in writing that she wishes to continue with her complaints against the first respondent personally, in which case this paragraph of the judgment will not take effect.

2. The claimant is granted permission to amend the claim form so that the following words are inserted in paragraphs 30 and 31.i of the particulars of claim:

> **"or in the alternative less favourable treatment because of race contrary to section 13 Equality Act 2010."**

3. As a consequence of that amendment the response form is treated as amended by the insertion of the following words at the end of paragraph 30 of the grounds of resistance:

> **"as are any allegations of less favourable treatment because of race."**

REASONS

1. The judgment removing the first respondent from the proceedings was made by consent. The second respondent does not rely on the reasonable steps defence in section 109(4) of the Equality Act 2010. It is therefore likely that the claimant no longer wishes to pursue proceedings against the first respondent personally. Ms Seery just needed a few days to get formal instructions.
2. If the claimant is content for the first respondent to be dismissed from the proceedings no further action need be taken. If she does not want him to be dismissed from the proceedings she should make that clear before 4pm on Friday 31 March 2017.

3. The second part of the judgment concerned an application to amend the claim form. As presented on 17 January 2017 it brought a complaint of harassment related to race contrary to section 26 Equality Act 2010 in the handling by Mr Smeeton of a student complaint against the claimant, in the handling of the claimant's grievance about that, and in comments alleged to have been made by Mr Smeeton on 20 October 2016 which were dismissive of the student complaint. A case summary appears in Annex A to the case management orders issued following this hearing.

4. The application to amend was made in the agenda form for the preliminary hearing and sought to introduce an alternative pleading that the same actions amounted to direct discrimination because of race contrary to section 13 Equality Act 2010.

5. Although conduct which amounts to harassment cannot also be a detriment for the purposes of section 39(2)(d) of the Act by reason of section 212(1), there may be situations in which a claimant fails to prove a case on harassment (for example, because the conduct does not create the proscribed environment) but where the conduct might nevertheless also amount to less favourable treatment because of race.

6. Ms Seery said that the proposed new complaint had not been included in the claim form because the claimant now had information from the response form which was not available at the time. She referred to paragraphs 9-11 of the response form. The information in those paragraphs includes confirmation that the student who complained about the claimant was black African, and that the complaint was also brought against a white British colleague, Lucy Ryan. The case the claimant wishes to pursue in the alternative, therefore, is that the alleged dismissive attitude of Mr Smeeton towards that student's complaint amounted to less favourable treatment of the claimant, and that it was either because of the race of the student or because of the race of the claimant. The claimant's case is that Mr Smeeton took a different approach when he discussed the complaint with Lucy Ryan.

7. I heard oral submissions from Ms Seery for the claimant and from Ms Haddock for the respondent before determining that permission to amend should be granted.

8. The power to grant or refuse permission for amendment is part of the Tribunal's general power of case management under rule 29. It must be exercised in accordance with the overriding objective in rule 2. The principles governing an

application to amend were set out by the Employment Appeal Tribunal in **Selkent Bus Co Limited t/a Stagecoach Selkent v Moore [1996] IRLR 661**. The Tribunal must take into account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The relevant circumstances include the nature of the amendment, the applicability of time limits, and the timing and manner of the application. I considered the relevant factors here.

9. The nature of the amendment seemed to me to be a pure re-labelling exercise. There were no new facts introduced by the amendment. It was the addition of another label to facts which had already been pleaded. It was not a substantial alteration raising new factual matters and a wholly new cause of action. Harassment and direct discrimination are conceptually different but closely related and it is common for them to be pleaded in the alternative.

10. The application was made outside the primary time limit. The latest date on which any allegedly discriminatory act occurred in the existing pleading was 20 October 2016. The primary time limit therefore expired on 19 January 2017 and the application was broadly two months late. Even if the claimant could rely on the period during which she underwent early conciliation with the second respondent, 17 November to 17 December 2016, the application was still made at least a month out of time.

11. In my judgment the delay was not entirely explained by the contents of the response form. Firstly, it seemed to me that the direct discrimination complaint based on the claimant's own race could and should have been identified at the time the claim form was originally lodged. Secondly, it would have been apparent to the claimant that the student must be from an ethnic minority because of her perception that Mr Smeeton thought the student was “playing the race card”. Accordingly it seemed to me that in truth this was an omission on the part of the claimant's representatives when first pleading the claim rather than genuinely a response to new information which put matters in a different light.

12. However, the proceedings were still at an early stage. There was time for the respondent to amend its response if it so chose. An amended response might consist only of a denial of any less favourable treatment because of race in any event. The witness evidence required would be exactly the same for the claim as originally pleaded. The respondent would have ample time to defend its case on section 13 properly and to have a fair hearing. Any additional cost in the amendment of the response form could be the subject of a costs application if appropriate.

13. I also took into account what was said by the Court of Appeal in **Abercrombie & Others Aga Rangemaster Limited [2014] ICR 209** at paragraph 50, namely that the relevance of the time limit depends on the circumstances. In a re-labelling application justice does not require the same approach as if a wholly different claim is pleaded, particular where the new cause of action arises out of the same facts as already in issue.

14. Overall this seemed to me to be a case where there was no question of any specific prejudice to the respondent from the claim being reformulated after the expiry of the time limit. If the amended complaint proves not to have been well founded the respondent will not have been prejudiced in defending it because it has to defend the harassment allegations anyway.

15. If I were to refuse permission to amend, however, it seemed to me the claimant might be substantially prejudiced if it proved to be the case that her harassment complaint was unsuccessful but a direct race discrimination complaint would have succeeded. She would then be denied a remedy because of a technical failure to plead the right cause of action at the outset.

16. Weighing the relative prejudice and hardship on each side, therefore, I decided that permission to amend should be granted.

17. In order to save the respondent the cost of formally amending its response form, I decided that the response form should be treated as amended as indicated in paragraph 3 of the judgment.

Employment Judge Franey

24 March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE