EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Tayel	**v**	Ormiston Academies & Others

Heard at: Bury St Edmunds **On**: 13 July 2017 & on paper

Before: Employment Judge Laidler

JUDGMENT ON CLAIMANT'S APPLICATION TO AMEND DATED 12 JULY 2017

Save insofar as the respondent did not object to the amendments leave to amend is refused.

REASONS

1. This matter was last before this employment judge at a preliminary hearing on 13 July 2017. As was recorded in the summary sent to the parties following that hearing the claimant wished to have opportunity to serve further authorities and it was agreed that the application to amend would then be considered by the judge on paper. All submissions having now been received the judge has determined that leave to amend should not be granted. Leave to amend was granted in relation to those issues where the respondent raised no objection and these are set out in the summary sent to the parties on the 9 August 2017.

Relevant law

2. Guidance as to the manner in which the tribunal's discretion should be exercised was given in *Selkent Bus Co Ltd v Moore* [1996] IRLR 661. 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. The following were indicated to be relevant considerations:-

   2.1 The nature of the amendment

Amendments range from the correction of clerical errors, the addition of factual details to existing allegations and the addition or substitution of other labels to facts already pleaded to the making of entirely new factual allegations which change the basis of the existing claim.

2.2 The applicability of time limits

2.3 The timing and manner of the application

An application should not be refused solely because there has been delay in making it. No time limits are laid down for the making of such applications. It is however relevant to consider why the application was not made earlier. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered are relevant.

Paragraphs 7 to 14 of Application to Amend

'Victimisation'

3. Refusing to provide information on the position despite that fact that the adverts says:-

> "For further details please telephone (01473) 601252"

4. The claimant states that he sought but was refused:-

> "The email address of the College Leader so he could contact him direct to obtain information.
>
> A request for an informal visit to meet the Form tutors and Pastoral Team in order that he might shadow a member of staff for a few hours and see how the school operated in comparison to other schools.
>
> The Respondents school internal document in order to establish whether he met the requirements for shadowing/work experience."

5. The respondent argues that by these claims the claimant is requesting 'more favourable treatment' than others and that as such the claims do not fall within the Equality Act, have no reasonable prospect and leave to amend should not be given.

6. It is correct that s.13 of the Equality Act 2010 refers to the claimant being treated 'less favourably'. The claimant in this case states that he seeks to put this allegation as one of victimisation. That requires the claimant to be subjected to a 'detriment'. This is not defined in the Equality Act but the EHRC Employment Code states that generally it is anything that 'the individual concerned might reasonable consider changed their position for the worse or put them at a disadvantage…'.

7. Section 23 does however require the detriment to be 'because' of the commission of a protected act. A comparison with how an appropriate comparator was or would be treated will still be helpful when considering whether the treatment was 'because of' the protected act'.

8. In considering an application for leave to amend the tribunal must take into account as one of the factors whether the claim has any reasonable prospect of success as to allow leave to amend a claim that does not would just result in putting the respondent to unnecessary costs. It is quite clear that this particular claim does not have reasonable prospects as the claim that is being sought to be advanced is one of more favourable treatment than others. The claimant is not going to be able to establish that his requests were refused because of his protected act. Leave to amend is refused.

Para 20 of application to amend – 'continuous act of victimisation'

9. The claimant then set out at the end of his application matters which he states 'were not part of previous litigation'. The claimant states that on 22 August 2016 he was made aware that Mrs Tankard stated:-

   9.1 The claimant is poor at chemistry.

   9.2 Lack of H&S knowledge.

   and that these statements had been made in 2015.

10. The claimant submitted that he became aware of these comments only a few weeks before the previous full merits hearing which started on 19 September 2016. He did not apply to amend as it would have increased the length of the proceedings, incurred costs and was out of time. He argues that it is not now out of time as there is a continuing act.

11. The respondent submits that this is something in relation to which the claimant could have sought leave to amend in the original proceedings. It is a discreet incident against Mrs Tankard, a person not named in these proceedings and is out of time even if the date of knowledge is taken as the date from which time runs.

12. In considering an application to amend the tribunal must, as one of the factors, consider time limits and whether or not the new claim sought to be added would now be out of time. If calculated from August 2016 this claim would have been out of time even when the claimant presented this ET1 on the 8 May 2017. It was even further out of time when the claimant applied for leave to amend before the last Preliminary Hearing.

13. The claimant could but chose not to include this matter in the original proceedings. That was a matter for him. He also failed to include it in this ET1. Leave to amend should not now be granted to rely on this matter.

Post termination – protected disclosure

14. The claimant informed the respondents that a child was found playing with a bottle of acid in the playground.

15. In the draft amendment the claimant asserts that this was not investigated adequately as Mrs Kidby confirmed that the incident took place. She stated that Mrs Tankard might know about the incident. No further information was provided as to how the child got hold of a bottle of acid. Again on 22 August 2016 the claimant states he was made aware that Ms Anderson had said in 2015 that 'the claimant does not know the role of science teacher'.

16. Since the Preliminary Hearing the claimant has indicated he relies on Onyango (appellant) v Berkeley t/a Berkeley Solicitors (respondent) [2013] IRLR 338 as authority for the proposition that a protected disclosure may occur after termination of the relevant employment. However, even though that might be the case the issue in considering the amendment is that, as set out above, this is a matter the claimant discovered in August 2016, did not seek to amend the earlier proceedings and did not include in this claim form. Leave to amend to include this claim should not be given.

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Employment Judge Laidler

Date: 15 October 2017……

Sent to the parties on: .....

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For the Tribunal Office