



EMPLOYMENT TRIBUNALS

Claimant: Mr A Adu

Respondents: 1. The Department for Work and Pensions

2. Mr Daniel Ireland

3. Mr Rashid Abdul Khaliq

Judgment

Application and issues

1. The claimant's application is to amend his claim to add the following race discrimination claims:

- a. Victimisation against the second respondent, Daniel Ireland
- b. Harassment against Daniel Ireland
- c. "Racial discrimination" against Daniel Ireland
- d. Harassment against the third respondent, Rashid Abdul Khaliq.

2. The issues are:

Where does the balance of injustice and hardship lie taking account of the following factors?

- The nature of the proposed amendment, and in particular whether it is a relabelling matter or a new cause of action, having regard to all the circumstances of the case.
- If it is a new claim and therefore out of time, whether it is just and equitable to extend time.
- Whether the application was made within a reasonable time period.

Evidence Considered

3. The tribunal considered the pleadings in these matters, the records of Preliminary Case Management Hearings, the claimant's application of 1 November 2021 and the respondents' response of 2 November 2021.

Background

4. The claimant issued two separate claims, one against The Department for Work and Pensions and Mr Daniel Ireland on 10 May 2020, and the other against Mr Rashid Abdul Khaliq on 11 May 2020. The claims are now joined.
5. The claims were for racial discrimination, although the types of discrimination were unclear from the particulars. The claimant submitted further details and amended claims in 2020. At a Preliminary Case Management Hearing on 21 October 2020, the respondents raised no objections to the claimant's amendments, and they were included in his claim. The claimant was also ordered to set out the details of some of his claims, which were not clearly particularised.
6. At another Preliminary Case Management Hearing on 21 January 2021, the list of issues were determined. In summary they were whether:
 - a. the first and second respondents directly discriminated against the claimant by putting him on an informal Performance Action and Learning Plan (PAL) because he was black;
 - b. the first and third respondents victimised the claimant due to him taking out grievances in December 2019 and February 2020; and
 - c. the first and third respondents subjected the claimant to a detriment by putting him on a PAL because they believed he had done a protected act.
7. At the Preliminary Case Management Hearing on 21 January 2021 the claimant confirmed that there were no claims other than those concerning the above issues. The record of the hearing states: *(7) The claimant confirmed that the other factual matters and allegations raised by him were by way of background and context only to the substantive claims as identified above.*
8. On the basis that this was the extent of the claimant's claims, case management orders were made to prepare the case for final hearing listed from 21 to 25 February 2022. The hearing bundle has now been prepared and witness statements have already been exchanged.

Law

9. Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1,
 - a. Rule 2 – overriding objective to be fair and just.
 - b. Rule 29 - the tribunal's general power to make case management orders.
10. *Presidential Guidance Note 1: Amendment of the Claim and Response Including Adding and Removing a Party.* The most pertinent provisions are that tribunals must carry out a balancing exercise having regard to the interests of justice and the relative hardship to the parties that would be caused by granting or refusing the amendment, considering in particular:
 - a. The nature of the amendment;
 - b. Time limits
 - c. The timing and manner of the application

11. *Selkent Bus Co Ltd v Moore* [1996] ICR 863 EAT provides that the tribunal should assess the relative hardship to the parties that would be caused by refusing or allowing the amendment. It largely reflects the Presidential Guidance above.
12. The factors identified in *Selkent* should not be used as a checklist. What is required in every case is an analysis of comparative disadvantage: *Vaughan v Modality Partnership* UKEAT 0147/20.
13. The tribunal should consider whether the amendment is merely a re-labelling of facts already relied on in the claim form or whether it seeks to introduce a wholly new claim. (Technical distinctions are not important here. What is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

Conclusions

14. Although the new claims are not all clearly particularised, they appear to be new causes of action. Although the claimant says that the facts relied on are already embedded in the existing claims, the tribunal finds that there are some significant differences and that new claims are being sought.
15. If they were to proceed, it is likely that another Preliminary Case Management Hearing would be required to clarify the basis of the claims. The respondent would then be afforded the opportunity to submit an amended response, the disclosure process would need revisiting and additional witness statements would be required.
16. There is insufficient time for this process to take place before the Final Hearing in February 2022 and therefore, the hearing would need to be postponed and there would be significant delay in finalising the case.
17. Given the time lapse since the alleged events and the fact that witnesses' memories fade, it would cause hardship to the respondents to require them to prepare new witness statements at this stage. Also, the cost to the respondents would be significant in preparing the additional documentation.
18. The new claims are significantly out of time. The claimant states that the reasons for this are that he did not have access to legal advice. This, he says, was due to problems with his Trade Union, his inability to pay for advice privately, and limited access to free legal advice due to COVID. Therefore, he says he was not aware that he could bring more than one claim against a single respondent in the same proceedings.
19. However, it is clear from the list of issues from the Preliminary Case Management Hearing of 21 January 2021, that more than one claim was being pursued against the first respondent. At least from this date, the claimant should have been aware that multiple claims against a single respondent were possible. Also, the claimant could have availed himself of online employment advice resources.

20. The claimant also relies on the seriousness of his claims as a reason to allow the amendment and quotes from *Law Society v Bahl* (2003) ILR 640, concerned with “rooting out certain forms of discriminatory treatment”. However, this is no authority for supporting an amendment application to add claims significantly out of time.
21. Although the first respondent is a large Government Department with social responsibilities, this in itself is not sufficient ground for extending time. The claimant quotes Judge Lloyd in *Mr P.M. Hoyte v Jaguar Land Rover Ltd.* as making reference to a large, high profile and well-resourced employer, and extending time on the grounds of justice and equity. However, each application must be dealt with on its own merits and the tribunal has considered the size and resources of the first respondent in reaching its conclusions.
22. The claimant quotes from *Pronto (Europe) Ltd v Mr Shinh and National Grid Plc* were the injustice to the claimant in disallowing his application to amend outweighed by far the injustice and hardship to the first respondent. However, all cases must be considered on their own merits and the merits of the claimant’s application have been considered on their own facts.
23. It is true that the claimant would be put to some hardship by not being able to pursue his new claims. However, this would not be unjust. He had the opportunity to seek to bring these claims on previous occasions, particularly at the earlier Preliminary Case Management Hearings, but failed to do so. He has not put forward sufficiently convincing reasons to persuade the tribunal that it would be just and equitable to extend time over 18 months after he brought the original claims and longer still since the occurrences of the acts complained of.
24. The hardship to the respondents would be greater if the application were allowed. There would be injustice caused by the adverse impact on the individuals concerned, by having to deal with new accusations so long after the event, by the effectiveness with which the respondent could now respond being reduced given the time lapse, and by the increased costs of defending the new claims, particularly when the existing claims are so close to final hearing.
25. In summary, the injustice and hardship to the respondent would be greater if the application were granted than it would be to the claimant if it were refused. Accordingly, having regard to the balance of injustice and hardship and the overriding objective, the application is refused.

**Case Nos:2405437/2020
2405479/2020**

JUDGMENT SENT TO THE PARTIES ON
3 December 2021

FOR THE TRIBUNAL OFFICE