EMPLOYMENT TRIBUNALS

Claimant: Mr J Richards

Respondent: Chief Constable of North Wales Police

Heard: by video **On:** 10 December 2021

Before: Employment Judge S Jenkins

Representation
Claimant: In person
Respondent: Mr P Kenyon (Solicitor)

JUDGMENT

The Claimant is permitted to amend his claim to include the matters referred to at paragraph 48 of the Reasons below.

REASONS

Background

1. This hearing was listed to consider whether the Claimant should be permitted to amend his claim, and then to deal with further case management.

2. The Claimant had initially submitted his claim form on 19 January 2021, contending that he had been discriminated against on the ground of sex, sexual orientation and race. He set out a number of factual matters which he contended gave rise to those claims, going back to 2019, when he came under the supervision of a new sergeant.

3. An earlier preliminary hearing in this case had taken place before me on 12 August 2021, to identify the claims and issues and to make case management directions and orders with a view to progressing the case to a final hearing. Just prior to that hearing the Claimant submitted a document (Document 1) in the form of a table in which he set out some additional factual matters in relation to his claims of sex discrimination and sexual orientation, and recorded that he wished to pursue claims of disability discrimination and

victimisation. He also included a number of matters which had arisen after he had submitted his claim form.

4. Document 1 was set out as a table containing 20 rows. Of those, 15 had been numbered, "Claim 1", "Claim 2" etc., and the Claimant confirmed, at the 12 August 2021 hearing, that the other five rows, to which no number had been allocated, did not give rise to specific claims, but provided background.

5. The proposed amendments were discussed at the 12 August hearing. Three of the numbered claims (3, 4 and 5) had already been set out in the initial claim form and could therefore proceed further. Three (1, 6 and 8) were accepted by the Respondent to have been raised factually within the initial claim form and could now be relabelled as additionally giving rise to claims of discrimination arising from disability. Four claims (2, 7, 9 and 11) had all occurred before the submission of the claim form on 19 January 2021 and had not been included in that claim form. Claim 10 had been included, but was now sought to be recast as a victimisation claim. Similarly, the Claimant sought to recast claims 6 and 8 as also involving victimisation. The remaining three claims (12, 13 and 15 (claim 14 did not involve any act by the Respondent)) all took place after the submission of the claim form.

6. Other than the matters accepted as either being in the initial claim form or only requiring relabelling (1, 3, 4, 5, 6 and 8), the Respondent did not agree to the proposed amendments, and they therefore needed to be considered as a way of a formal application to amend. I gave directions to the Claimant to provide submissions on why his amendments should be allowed. I indicated that he should address the matters raised in the Employment Tribunals (England and Wales) Presidential Guidance – General Case Management (2018) – Guidance Note 1 on the amendment of a claim as needing to be taken into account, and the guidance provided by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836, as commented upon further in Vaughan v Modality Partnership (UKEAT/0147/20). I further directed that the Respondent should respond with its submissions on why the amendments to the claim form should be refused. This hearing was then listed to consider those amendments.

7. Following the August hearing therefore, I anticipated that formal consideration would need to be given to whether the Claimant should be allowed to amend his claim to include four matters (claims 2, 7, 9 and 11) which had arisen prior to the submission of the initial claim form, but had not been referred to within it; three claims (6, 8 and 10) which had been referred to within the claim form, but which were contended now to also involve acts of victimisation; and three claims (12, 13 and 15), which had arisen after the submission of the claim form.

8. The Claimant provided his written submissions within the specified time, but referred within those submissions to 27 claims and not the original 15. At the suggestion of the Respondent's representative, he separated his list of claims into an individual document (Document 2), and he highlighted in that document those which were new claims. The Claimant had re-numbered some of his previous claims within Document 2, and had highlighted 15 additional claims which would need to be considered.

9. In relation to the timings of the applications to amend, I had noted in my summary of the preliminary hearing on 12 August 2021 that the application to amend as set out in Document 1 had been made on 9 August 2021. The application to amend in Document 2 was then received on 22 September 2021.

10. The Claimant informed me that he had, some two weeks before this hearing, been dismissed by the Respondent, and was very likely to be pursuing a claim in respect of that dismissal, asserting both that it was unfair and that it was a further example of discriminatory treatment. Bearing in mind that I reserved my judgment in respect of the amendment application, and that there was, in any event, insufficient time at the end of the hearing to deal with case management matters, I indicated that the likely way forward would be that, when a claim form was received from the Claimant in relation to his dismissal, the cases would be combined and managed together.

Issue and law

11. The issue for me to address was whether the Claimant's amendments, set out in both the Claimant's documents, should be allowed to be made.

12. With regard to the applicable law, the test to be applied involves the assessment of the balance of injustice and hardship of allowing or refusing the amendment. The Employment Appeal Tribunal ("EAT") in Selkent, reiterated that point, which had previously been made in Cocking v Sandhurst (Stationers) Limited [1974] ICR 650, and noted a non-exhaustive list of relevant circumstances which would need to be taken into account in the balancing exercise, namely; the nature of the amendment, the applicability of time limits, and the timing and manner of the application to amend. Those points have subsequently been encapsulated within the Employment Tribunals (England & Wales) Presidential Guidance on General Case Management (2018), Guidance Note 1.

13. The EAT, more recently, in Vaughan, gave detailed guidance on applications to amend tribunal pleadings. That confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application, but noted that the focus should be on the real practical consequences of allowing or refusing the amendment, considering whether the Claimant has a need for the amendment to be granted as opposed to a desire that it be granted.

14. With regard to the specific elements identified in Selkent, the Claimant had accepted at the August hearing that his proposed amendments (other than those which were accepted as only involving relabelling and which have therefore been agreed) were substantial.

15. With regard to time limits, Selkent had indicated that if a new complaint was sought to be added, it would be "essential" for the Tribunal to consider whether that complaint was out of time and, if so, whether the time limit should be extended under the relevant statutory provisions.

16. The Presidential Guidance, paragraph 5.2 makes a similar point, noting that, "*If a new complaint or cause of action is intended by way of amendment, the*

Tribunal must consider whether that complaint is out of time and, if so, whether the time limit should be extended".

17. However, the EAT, in Galilee v The Commissioner of Police of the Metropolis [2018] ICR 634, noted that it is not always necessary to determine time points as part of an amendment application, and that a Tribunal can decide to allow an amendment subject to limitation points. The EAT noted that the use of the word "*essential*" in Selkent should not be taken in an absolutely literal sense, and should not be applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered.

18. In this case, I noted that the Respondent's position is that the Claimant's claims, both those included in the initial claim form and those sought to be added by way of amendment, have not been brought within the required time period, such that the question of whether the claims are out of time or not will be a live issue for determination by the final Tribunal.

19. With regard to claims arising after the submission of the initial claim form, the EAT, in Prakash v Wolverhampton City Council (UKEAT/0140/06), confirmed that there is no reason in principle why a cause of action that has accrued after the presentation of the original claim form should not be added by amendment if appropriate.

20. With regard to the timing and manner of the application to amend, the EAT, in Martin v Microgeneration Wealth Management Systems Ltd (UKEAT/05/006) noted that whilst late amendments can be permitted in appropriate cases, the later an application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment. Indeed, the overriding objective, which the Tribunal Rules require to be applied, involves dealing with cases expeditiously and in ways which save expense, and undue delay may be inconsistent with that.

21. However, the appellate courts have made clear that applications to amend can be made at any stage, with the key principle being the need for the applicant to show why the application to amend was not made earlier. The EAT, in Ladbroke Racing Ltd v Trainer (UKEATS/0067/06), noted that, in addition, the impact of delay on additional costs may be relevant, as may be circumstances where the delay has put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than would have been the case.

22. The reason for the delay is also of importance, particularly if an application for amendment is made close to a hearing date.

23. The circumstances set out in Selkent were however specifically referred to as being non-exhaustive, and other factors can be taken account in the balancing exercise. That may include the merits of the claim being sought to be added. However, a Tribunal should proceed with caution in considering the prospects of success in the context of an application to amend. The EAT, in Woodhouse v Hampshire Hospitals NHS Trust (UKEAT/0132/12), noted that whilst an examination of the merits may be a relevant consideration, as there is no point in allowing an amendment to add an utterly hopeless case,

it should otherwise be assumed that a case is arguable.

The Claimant's position

24. The Claimant answered some questions from the Respondent's representative and from me, and, whilst noting that he suffered from stress and anxiety throughout the relevant period, and was diagnosed with autism spectrum disorder in May 2021, the principal reason for him not including the additional matters in his initial claim form was primarily down to his state of knowledge and the advice he had received.

25. The Claimant had worked as a police officer for over 30 years, principally operating in relation to traffic and road safety. Following his retirement, he returned to work for North Wales Police as a Police Community Support Officer, and then subsequently moved to a position of Camera Enforcement Officer in July 2018. Whilst therefore, the Claimant had significant experience and understanding of criminal law and procedure, he had no prior experience of employment law or employment tribunal procedure at the time he submitted his claim form in January 2021.

26. The Claimant also noted that he had submitted the claim form in something of a rush, having made contact with ACAS on 21 December 2020 for the purposes of early conciliation, with the early conciliation certificate having been issued the following day, 22 December 2020, albeit in circumstances where the Claimant was not aware that the early conciliation period had ended until January 2021. It was only when he spoke to ACAS in January, when they informed him that he had to submit his claim by 21 January 2021 (I observe that the time limit would have in fact expired the following day) that he then put his claim in on 19 January 2021.

27. Just before the August preliminary hearing, the Claimant then obtained some advice, on a pro bono basis, from a barrister operating under the ELIPS scheme. That advice was that the claim form did not fully reflect the case that the Claimant wished to bring, and that the Claimant should produce a chronology of all the things he complained about and submit that to the Tribunal, contending either that matters had already been included in the claim form or, if not, applying to amend.

28. After the hearing on 12 August 2021, the Claimant took further advice, this time from the Citizens Advice Bureau, albeit not legal advice. In that, the Claimant was advised that he should submit everything about which he was concerned to the Tribunal, as it would be beneficial for all matters to be raised. That then led the Claimant to produce Document 2 in which he referred to those matters referred to in Document 1 as background as specific claims, and also added in other additional claims, which included additional factual matters which had arisen after the August hearing.

The Respondent's position

29. The Respondent's position was that the Claimant's claims were out of time and he would therefore need time to be extended on the just and equitable basis in order for the claims to be pursued, contending that the Court of

Appeal decision of Robertson v Bexley Community Centre [2003] IRLR 434 noted that the exercise of discretion was the exception rather than the rule.

30. The Respondent also noted that the Claimant had had various degrees of support, from his union (albeit I observed that the Claimant was quite critical of the support he had received from his union, although he now hoped that the union would be prepared to fund legal advice for him following his dismissal), ELIPS, and the CAB.

31. The Respondent also noted that it was publicly funded, and that being faced with having to deal with additional claims would increase its cost burden, either directly, on the basis that the defence of the Claimant's claims would need to be outsourced to an external law firm, or indirectly, in terms of opportunity cost, if it continued to be dealt with it in-house in circumstances where the in-house resource would not then be able to attend to other matters.

Conclusions

32. In reaching my conclusions on the Claimant's various amendments, I focused on the balance of injustice and hardship of allowing or refusing the amendment, as directed by both Selkent and the Presidential Guidance. I also focused, as suggested by Vaughan, on the real practical consequences of allowing or refusing the amendment.

33. I noted that the core of the Claimant's claims related to the way he had been treated by the sergeant who commenced supervising him in May 2019. In his initial claim form he had specified several matters relating to his treatment by that sergeant, which he contended amounted to discrimination.

34. Bearing in mind that we are still at a relatively early stage in the progress of this case, and the fact that the sergeant, and any other individuals who may have witnessed the interactions between the sergeant and the Claimant, will already be required to give evidence in respect of several, already pleaded matters, I considered that there would be little practical hardship that the Respondent would face in having to deal with a number of additional factual matters.

35. It was not clear to me whether the Claimant would face significant disadvantage if his applications were not allowed to proceed, as his claim form already included several factual matters which, if proven to have taken place, could potentially point towards discriminatory treatment. The additional matters may not strengthen the Claimant's case significantly. Indeed, without going into the merits of them in any detail, certain of them were not immediately suggestive of discrimination. However, I was conscious that the evidential background will need to be explored before a view was formed as to whether the additional matters sought to be included by the Claimant substantiate his claims.

36. At this preliminary stage I was satisfied that the Claimant could be impacted, potentially significantly, if the matters he contended should be included as part of his claim were not allowed to be aired.

37. Overall therefore, I considered that the balance of hardship and convenience lay in accepting the applications to amend in relation to those matters which referred to conduct on the part of the supervising sergeant.

38. With regard to the specific Selkent factors, the Claimant himself had previously accepted that the amendments he sought to make were substantial. I noted, with regard to the applicability of time limits, that there was a general issue between the parties as to whether the Claimant's claims in their entirety had been brought within time or not. I noted that the Respondent's position was that the Claimant's claims had been brought out of time, whereas the Claimant contended that they all formed part of a course of conduct extending over a period, the end of which fell within time. That may also, of course, be impacted by any further claim the Claimant may pursue arising from his dismissal.

39. In the circumstances, noting the dispute between the parties over the time limit point, I did not consider that it was a matter which weighed heavily in my assessment of the balancing exercise. I make clear that, applying Galilee, I make no decision as to whether any or all of the Claimant's claims, both initially pleaded and subsequently allowed to be amended, have been brought in time. That remains a matter to be addressed by the Tribunal which finally considers the Claimant's claims.

40. With regard to the timing and manner of the applications to amend, whilst matters have been raised which could have been included within the initial claim form, and other later matters could have been raised earlier than they were, I noted the Claimant's position, at the time the claim form was submitted, of being under some time pressure to submit the claim. I also noted the limited advice the Claimant had received on a pro bono basis, in August and September, which had led him to prepare his two documents seeking to make applications to amend. As I have already noted, we are at a relatively early stage in the progress of this claim, and therefore I did not consider that there would be any particular difficulties caused to the Respondent arising from matters now being added by way of amendment to be included as part of the Claimant's claims.

41. That meant that the matters included in claims 1 to 16 inclusive in the Claimant's Document 2 will be allowed to proceed.

42. I took a different view however, in relation to some of the other amendments the Claimant sought to make. These did not involve the Claimant's treatment by his supervising sergeant, but largely related to his interactions with other individuals within the Respondent's organisation in respect of his complaints about that treatment.

43. Whilst the Claimant clearly had concerns, addressed in his initial claim form, that his move to half pay, and subsequently to nil pay, in respect of his sickness absence amounted to discriminatory treatment, he had not made reference to other matters within his claim form.

44. Of those, several appeared to relate to complaints only about communications received by the Claimant, either by email or by letter, which he contended involved discriminatory treatment, largely on the basis that they

did not concur with the Claimant's perspective of events and/or contradicted other communications he had received. That extended to a complaint about the way Mr Kenyon, as the Respondent's representative, had completed the Tribunal's case management agenda in advance of the August hearing.

45. I did not consider that the Claimant had any reasonable prospect of establishing that receiving a letter or other document which, in his view, contradicted other communications would, in and of themselves, be capable of amounting to discriminatory treatment or victimisation.

46. I considered that the balance of hardship lay against allowing those amendments as it would require the Respondent to seek and adduce evidence from other individuals, thus increasing the preparatory work it would need to undertake prior to the hearing, and also increasing the length of the hearing, in circumstances where I did not consider that even if the Claimant established that the particular communication contradicted an earlier comment, it would nevertheless be held to be an act of discrimination or victimisation. By contrast, I did not consider that the Claimant would suffer any material hardship in not being able to pursue such matters. That led me to conclude that claims 18, 23, 25, 26 and 27 in Document 2 should not be allowed to be included as amendments.

47. I took a different view with regard to the email referred to in respect of claim 17. That appeared to assert that a specific decision communicated within that email was an act of discrimination or victimisation. I took a similar view with regards to claims 19 and 20, regarding the management of a mediation process, and comments within that process, which again could potentially be considered to be acts of discrimination or victimisation. I also took a different view with regard to claim 24, about the Respondent's response to the Claimant's data subject access request, on the basis that that communication appeared to include an active refusal to deal with the request, which again could be potentially considered to be an act of discrimination or victimisation.

48. Overall, therefore, and using the numbering of the claims in document 2, I considered it appropriate to grant the application to amend the following claims: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22 and 24.

49. I did not consider it appropriate to grant the following amendments: 18, 23, 25, 26 and 27.

50. For the avoidance of doubt, I should add that my decision is simply to allow the noted claims to be added to the Claimant's claim to be dealt with at a final hearing. That decision should not be taken to be any comment on the potential merits of those claims. I note that the Respondent takes issue with the claims broadly, and specifically with regard to time limits, as I have already mentioned, and, in relation to the issue of disability and the knowledge of any disability. All those matters will therefore remain live issues to be considered by the Tribunal which deals with the final hearing.

Employment Judge S Jenkins

Date: 22 December 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON 11 January 2022

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FOR THE TRIBUNAL OFFICE Mr N Roche