EMPLOYMENT TRIBUNALS

RESERVED JUDGMENT
FOLLOWING A PRELIMINARY HEARING

Claimant: Mr. N Santos

Respondent: Winfield Engineering Limited and Others

Heard at: Nottingham **On:** 10 March 2020

Before: Employment Judge Rachel Broughton (sitting alone)

Appearances

For the claimant: In Person
For the respondents: Mr. Tariq Sadiq – counsel

JUDGEMENT

The Judgement of the tribunal is that on hearing both parties, leave to amend the claim is granted under rule 29 of the Employment Tribunal Rules 2013 to add the complaints set out in Appendix B to this Judgement.

REASONS

The Claim

(1) The claimant was employed by the respondent from 7 February 2017 to the 25 January 2019. The respondent terminated the claimant's employment in what it alleges was a redundancy situation.

(2) The claimant issued a claim on the 20 March 2019 after a period of ACAS early conciliation from 25 January 2019 to 25 February 2019.

(3) On the 22 March 2019 the claimant sent an email to the tribunal setting out further complaints and stating that there had been insufficient space on the claim form submitted on line.

Previous Preliminary Hearing: 28 August 2019

(4) The case came before Employment Judge Batten at a Preliminary Hearing on 28 August 2019. An Order was made to add as respondents; Mr. Simon Winfield and Mr. Dion Short.

(5) The claimant had sent in with his agenda to that previous Preliminary Hearing, a document headed; 'Main Heads of Claim.' It was decided to deal with the application to amend his claim to add the allegations in the 'Main Heads of Claim' document, at a further Preliminary Hearing, which is the purpose of today's hearing (along with the making of case management orders). Employment Judge Batten's Order refers to the administrative backlog resulting in the claim not being processed until 21 May and that the claimant had emailed the tribunal on a number of occasions to point out that the third and fourth respondents had not been included in the claim form produced by the online ET1 issuing process and also that certain details of the complaints were missing. The Order set out what Employment Judge Batten understood the legal complaints to be which were being pursued (as they appear in the claim form and the 22 March 2019 email).

Today's Hearing

(6) The claimant was assisted today by an interpreter.

(7) It was clear on reading through the document "Main Heads of Claim" that there was a degree of repetition of allegations set out in the claim form and the email of the 22 March, and this document. It was also difficult to understand some of the allegations in the claim form itself, I make no criticism of the claimant for that, he had prepared it and his English is limited. We spent a not inconsiderable amount of time today however going through the claim form and email of the 22 March, to identify the existing claims and then identifying from the 'Heads of Claim' document what the additional allegations were which the claimant is seeking to add. It is to be noted that the email of 22 March 2019 was submitted to the tribunal within the applicable time limit, taking the date of termination as the last act. Counsel for the respondent took no issue in any event with the addition of what was contained in the 22 March to the extant complaints in the claim form.

Reason for dismissal - victimisation

(8) Neither party had brought with them a copy of the 22 March 2019 email, (counsel had received a copy previously from his instructing solicitors

but had not retained a copy). It was a short email and therefore I read it out to the parties. It is to be noted that although the Order of the 28 August 2019 attached with it an Index of claims which included under unfair dismissal, whether the claimant had the requisite 2 years' service, the claimant did not dispute today that he did have less than 2 years. This is therefore not an issue.

(9) Under the heading 'unfair dismissal' in Annex B to the 28 August Order, it also refers to the claimant's email of the 22 March 2019 suggesting claims for unfair dismissal for health and safety reasons. However, today the claimant confirmed that he does not allege that he was dismissed because he raised health and safety issues, his complaint is that his concerns about health and safety were not dealt with/not taken seriously because of his race/ethnicity.

(10) The claimant clarified that this his complaint about dismissal, is that he was dismissed because he had raised complaints about being paid less than other welders, and that this was discriminatory. It is a claim of victimisation under section 27 Equality Act 2010. Counsel for the Respondent accepted that the combined effect of the claim form and the email of the 22 March 2019 sufficiently identified this claim such that no amendment was not required. The email states under the hearing 'Authentic Unjust Demission' (i.e. dismissal);

"Health and safety and because asked for salary increase"

The complaints

(11) The legal complaints as they arise from the claim form and the claimant's email to the tribunal dated 22 March 2019, are set out in an **Annex A** to this Order. It was agreed between the parties at today's hearing, that these are the extant complaints. If I have not understood the claimant's case, it is imperative that he promptly applies to amend it.

(12) I set out in **Appendix B** the amendments the claimant is seeking to add. This list was agreed with the parties.

Amendment Application

(13) The application to amend was brought by the claimant however, given the claimant has very limited English and is a litigant in person, counsel helpfully offered to make submissions applying the Selkent principles first, to allow the claimant to understand better the issues to be considered by the tribunal.

(14) Employment Judge Batten had in her case management order directed the claimant to the application of the Selkent principles in Selkent (*Bus Co Ltd v Moore 1996 ICR 836, EAT*) and following the representations

of counsel, I summarised the Selkent principles again before the claimant was invited to make his application

(15) As counsel for the respondent contended that the amendments were new claims which engaged the requirement to consider time limits, the claimant was given an opportunity to give evidence on oath regarding the delay. He was cross examined by counsel.

(16) Before setting out the parties' respective submissions and the claimant's evidence, I shall set out the applicable legal principles which I have considered as part of my decision-making process;

The Legal Principles: Just and Equitable Extension: section

(17) The applicable time limit is set out at section 123 (3) Equality Act 2010, it is within 3 months from the act of discrimination. Where there is conduct extending over a period, it is to be treated as done at the end of that period: section 123 (3)(a).

(18) The question of amendment must be considered in the light of the circumstances existing at the date when the application to amend was made: *Selkent.* The question of whether a new claim or cause of action contained in an application to amend would be time barred, falls to be determined by reference to the date when the application to amend is made.

(19) The issue of whether a claim has been brought within the limitation period does not have to be determined at the outset of the case. Where a tribunal is unable to properly establish the date of the discriminatory act and whether the act is part of a continuing act or continuing, in the absence of evidence from the parties that would have to be presented at a full hearing.

(20) In exercising their discretion to allow out-of-time claims to proceed, tribunals must consider whether it is just and equitable to extend time and will err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. It is necessary to weigh up the relative prejudice to both parties of granting or refusing the extension.

(21) Tribunals should consider the checklist in section 33 of the Limitation Act 1980 . It requires the court to consider the prejudice which each party would suffer and to have regard to all the circumstances of the case and, inter alia, to –

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had co-operated with any requests for information.

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Amendments

(22) The Employment Tribunal's power to grant leave to amend a claim derives from its general case management powers (see Rule 29 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013). In exercising those powers, the Employment Tribunal must seek to give effect to the overriding objective set out in Rule 2 of those Regulations.

(23) When considering applications to amend, a Tribunal should consider carefully the guidance provided for by the Employment Appeal Tribunal in **Selkent Bus Company Ltd v Moore 1996 ICR 836.** Mummery J, the then President, gave general guidance as to how applications for leave to amend, including applications for amendments raising a new cause of action, should be approached. The **Selkent** principles, as they are generally known, include the following:

"Whenever the discretion to grant an amendment is invoked, 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.

(24) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

(25) Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

(26) If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time

limit should be extended under the applicable statutory provisions e.g., in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and manner of the application

(27) *An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."*

(28) On the question of time limits, it is important to remember that many types of complaint are subject to time limits which may be extended if it just and equitable to do so (see particularly section 120(3)(i) of the Equality Act 2010). In such a case an Employment Tribunal, when considering whether to grant permission to amend outside the primary time limit, will need to consider whether it is just and equitable to do so. In practice, this imports the same test as the "balance of hardship" test set out within the **Selkent** principles

Submissions

(29) Counsel for the respondent argues that the amendments raise new claims and therefore that the tribunal, must consider the question of whether the time limit should be extended pursuant to section 123 of the Equality Act 2010.

(30) Counsel for the respondent argued that the amendments were major, being 12 new complaints. The allegation about working in conditions where the claimant did not have adequate/clean breathing apparatus or ventilation although mentioned in the claim form, was not identified as a race discrimination complaint.

(31) If the last act is taken as the act of dismissal on 25 January 2019, the claim form was presented on 20 March 202, therefore if the amendment raises new claims or causes of action, those are brought well outside of the primary 3-month time limit. The application to amend was first made at the Preliminary Hearing on the 28 August 2019, the claims were still out of time by that stage.

(32) The case management order of Employment Judge Batten refers only to the 'Heads of Claim' document, it does not refer to any amendment regarding the health and safety/breathing apparatus issue.

(33) Further, the Respondent today raised the point that the Order of Employment Judge Batten had required the claimant to explain the grounds for his application to amend but that he had not done so before today's hearing, however counsel conceded that the Order did not specify a date this had to be done. Indeed, I note that the Order does not stipulate that this had to be done at any stage before today's hearing.

(34) Counsel argued that the balance of prejudice weighed in the respondent's favour, could impact on the hearing time and the application should be rejected.

(35) Should I find that the amendments give rise to new claims or causes of action, I heard from the claimant who gave oral evidence to address the delay.

(36) The claimant's explanation for not including all the claims at the outset when he filed the claim with the tribunal was in summary;

i. He completed the form on line and he could not add all the details

ii. He had "everything arranged, all the notes" and brought the Heads of Claim document to the Preliminary hearing in August; he did not realise he had to raise everything in the claim form, he thought he could mention 'everything' at the Preliminary Hearing

iii. He sent an email (22 March) to the tribunal explaining that he had not been able to send everything with the claim form.

iv. The claimant when cross examined by counsel, stated he had psychological problems since working for the respondent, he had however not brought any medical evidence with him and did not allege that this had prevented him from arranging "everything".

v. He had sought advice from the CAB who suggested he obtain legal advice as they did not have someone to assist him.

vi. The claimant contacted Acas for advice.

vii. The claimant had asserted that he had been told by tribunal staff he could bring the information to the Preliminary Hearing but then stated that he had emailed the tribunal because he could not communicate by telephone due to his language difficulties.

(37) Counsel for the respondent after the claimant had given his evidence, made submissions and argues that the claimant had not given an adequate explanation and no medical evidence to support his allegation that he was ill.

(38) The claimant's email of the 22 March states; "…*the types of claims I want to join in the process, for not having space in the online form to write*." The email refers to; "*race and maustratos [mistreatment]* ***daily"*** and then lists dates when he alleges he was called '*black*'

Is this a new claim or new cause of action?

(39) I have considered the application of the Selkent principles, and I do not consider on balance, that the allegations raise new claims. The claimant's claim form is difficult to understand in parts, his English is limited. The claim form (which the respondent does not allege was submitted out of time), makes the following complaint;

"I suffered from ***various types of maltreatment every day*** *for every manager of this company, Mick Packman, Dion Short and Simon Winfield, during all the times I worked for the company, that's why I had mental problems …because of being* ***mistreated and discriminated against*** *because of my race and my color"*

(40) The claimant in the email to the tribunal on 22 March 2019, refers to not having had space on the online form to and refers in this email to;

"***maustratos [ill treatment] daily"***

(41) The claim form contains details some incidents but it is clear from the general comment that he is complaining of ongoing, daily mistreatment.

(42) The original claim form clearly includes a claim of race discrimination, this is the central claim. It is also clear that those are claims of direct discrimination and harassment. The amendments are further allegations of the same type of treatment and are allegations of direct and/or harassment on the grounds of race. Further, the claimant alleges ongoing, daily acts but does not set out all of them in the original claim. I consider that what the claimant is doing in the Heads of Claimant document is providing further details of the claim of race discrimination. That he is adding detail to the general allegation of ongoing daily mistreatment because of his race. He is adding 'flesh to the bones' of the existing claim of daily race discrimination, not raising new causes of actions or new claims.

(43) I have considered the application of the Selkent principles;

(44) *Nature of the amendment;* as stated I do not find that the amendments raise new claims or causes of action, the amendments add factual detail to the allegation of daily mistreatment on the grounds of race. The factual allegations do not change the basis of the existing claim, it

remains a claim of ongoing direct discrimination and harassment due to race.

(45) *Time Limit:* I do not consider time limits are relevant in the circumstances of this case. It will be for the tribunal at the final hearing to determine whether the claims in Annex A and B amount to a continuing course of conduct along with the complaints set out in the claim form and 22 March email.

(46) *Timing and manner of the Application*: I have considered that the claimant notified the tribunal within two days of filing the claim that he had difficulty putting all the details in the on-line system, that he submitted the amendments before the first Preliminary Hearing, a year before the case was due to be heard. It is still some months before the hearing and before disclosure has taken place or exchange of witness statements.

(47) I also consider it relevant that the claimant is a litigant in person. He explained how he had approached the CAB for assistance but as he described it they were not able to offer much assistance. I have taken into account how he appeared before me today in terms of his very limited English and the disadvantage this is likely to have caused him in understanding what was required of him in terms of pursuing his claims in the tribunal.

(48) I have considered the relative injustice and hardship of granting or refusing the application. Counsel for the respondent referred to the possibility of having to adjourn the hearing, that may or may not be necessary however that depends how quickly the case can be relisted and counsel did not indicate any particular hardship this may cause the respondent.

(49) Counsel referred to a possible costs application if an adjournment was required but did not identify what additional costs this may give rise to at this stage.

(50) Counsel did not identify any hardship to the respondent, he focused on the possible need to adjourn and the claimant's lack of adequate explanation for the delay.

(51) Counsel did not argue that the amendment would give rise to any difficulties regarding the cogency of the evidence.

(52) Counsel for the respondent did not assert that there would be any difficulty for the respondent in allowing the amendment in terms of the availability of witnesses etc. The respondent has been aware of this amendment application since receiving the Head of Claim document last August.

(53) The claimant struggled to articulate his case today, however it is apparent from what is pleaded that what he is complaining about is an

ongoing course of conduct, what he alleges to be 'daily mistreatment'. To not allow his complaints may make it more difficult for him to succeed in his claim and/or may impact on the compensation he may be awarded.

(54) I consider that taking all the circumstances into account, including the relative hardship and injustice, that the balance weighs in favour of granting the amendment to include the allegations in Appendix B.

(55) Even if the correct interpretation is that the complaints raise new claims which necessitate a consideration of time limits, in the circumstances I would have granted an extension for the following reasons;

(56) *Length and reasons for the delay*: the claimant has shown on the face of the claims, by reference to the ongoing nature of the treatment and the involvement of the same three 'actors' a prima facie case of a continuing course of conduct. Taking the last date as the date when his employment was terminated, for what he alleges was an act of victimisation (25 January 2019), or in the alternative the date it is alleged Mr. Winfield swore at him (15 January 2019); the amendments if they raise new claims are presented out of time. The Heads of Claim document was sent in on 24 August 2019 and the amendment application discussed at the hearing of the 28 August. The primary time limit was on or around 18 or 24th April 2019 (taking the 19th or 25th January dates), factoring in the Acas early conciliation period into account, the time limit was on or around 15 May 2019. The amendments were submitted therefore about 3 months and 2 weeks after the end of the time limit (subject to a finding of a continuing course of conduct). I consider it would be just and reasonable to allow an extension for that period.

(57) I have also considered the reason for the delay; the claimant's case is that he had not been able to file the documents on line, had informed the tribunal of this on 22 March and had understood that he could bring the other details to the Preliminary Hearing. The Claimant's English is as I have said, very limited and this must be a relevant factor when considering whether it is just and equitable to extend time.

(58) Counsel for the respondent did not raise any issue over the cogency of the evidence likely to be required. The three key individuals involved have all now been joined as respondents and have had knowledge of the detail in the Heads of Claim document since August of last year.

(59) Whether the claims are part of a continuing course of conduct and thus brought in time, is a matter reserved for the Tribunal at the final hearing.

Appendix A

The following are (very much in summary) the complaints of direct discrimination under section 13 Equality Act 2010 and/or in the alternative complaints of harassment under section 26 of the Equality Act 2010, further details of which are set out in the Heads of Claim document;

1. On 11 October 2017 at 11.16am: Mr Parkinson called the claimant a 'nigger'

2. On 25 May 2018 11:35am: Mr Parkinson called the claimant a 'nigger'

3. On 15 January 2019 1:45pm: Mr Winfield told the claimant to 'fuck off'

4. On 4 November 2018 1:30pm;

    a. Mr Short Placed the claimant under undue pressure to do the work and made comments to that effect.

    b. Mr Short informed Mr Winfield that the claimant had not done/done as much work, as he had in fact completed.

    c. Mr Winfield told the claimant to 'fuck 'off'

5. On 11 December 2018: Mr Parkinson called the claimant a 'nigger'.

Other complaints;

6. Unlawful deduction from wages (section 13 Employment Rights Act 1996): unpaid holiday pay.

7. Dismissal: victimisation undersection 27 and 39 (4) (c): Equality Act 2010 – the claimant alleges that he raised a complaint about not being paid the same due to race, that he raised this complaint on 25 January 2019, and on one prior occasion.

Appendix B

The amendments all relate to complaints of direct discrimination and harassment;

1. 10 September 2018 at 9:12am: Mr Short and Mr Winfield – pressure to work faster

2. 4 September 2018 at 9am: Mr Packman – knocking on the door of the toilet while the claimant was using it

3. 7 November 2018 at 11am: Mr Packman knocking on the door of the toilet while claimant using it

4. 9 August 2018: 15:32pm: Mr Parkman made unreasonable excuse for not granting requested pay increase

5. 10 December 2018: 7am: Mr Winfield ordered claimant's chair and table to be removed and tools were scattered

6. 13 December 2018 at 15:00pm: Mr Packman knocking on the toilet while claimant using it and taking picture of claimant's work

7. 16 October 2018 at 13;30pm: Mr Short timing how long it took claimant to do his work

8. 22 January 2018 at 15:30pm: timing the claimant's work; Mr Packman, Mr Short, Mr Winfield

9. 22 November 2018 3:30pm: false allegation regarding time claimant's takes in the bathroom

10. 23 January 2019 at 7am: colleague instructed to time the colleagues work; Mr Short, Mr Winfield and Mr Packman

11. Report the happenings: prevented by Mr Packman from raising a complaint with the office about his pay –on 25 January 2019 and one prior occasion.

12. That the claimant was forced to work in conditions where he had no breathing apparatus/ breathing machine had a dirty filter and no adequate ventilation was provided. His complaints were not addressed/taken seriously because of his race/ ethnicity.

Employment Judge Rachel Broughton

Signed: 16 March 2020

Sent to the parties on:

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For the Tribunal:

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