



EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of
Tribunals

“This has been a remote hearing not objected to by the parties. The form of remote hearing was by video ((CVP). A face to face hearing was not held because it was not practicable and no-one requested the same.”

Claimant: Mr S Thompson

Respondent: Perrys Motor Sales Limited

HELD at Watford by video (CVP) ON: 13 January 2022

BEFORE: Employment Judge Bloch QC

REPRESENTATION:

Claimant: In person

Respondent: Mr Wilkinson, Counsel

JUDGMENT ON PRELIMINARY HEARING

1. The claimant’s application to amend his unfair claim is allowed.
2. His application to amend the claim form to add a claim of age (or general) discrimination is refused upon withdrawal by the claimant

REASONS

1. A set out in a Case Management Summary of a Preliminary Hearing on 20 August 2021 one of the issues to be determined today was the claimant's application to amend his claim which was to be set out in writing as ordered by the Judge at that hearing. The Judge dealt with the proposed amendment application at paragraphs 10 through to 15 of Case Management Summary. At paragraph 3 of the orders made at that hearing the Judge ordered that by 17 September 2021 the claimant must set out in writing his application to amend his claim. He was directed to the Presidential Guidance on General Case Management and to the case of **Selkent Bus Company Ltd v Moore** [1996] ICR 836. His application was to include various stated particulars. In particular, in relation to the age discrimination claim: (amongst other things) he was to set out the facts upon which he relied to suggest that any difference between the respondent's treatment of the claimant and his comparator(s) was because of age. Also, the claimant was to state the particular age group he alleged that he fell within that led to him being treated less favourably than those falling outside of that age group. Other directions were given as to the particulars to be provided in relation to the proposed amendments related to bullying and wage manipulation. In regard to "Additional detail of unfair dismissal claim" (paragraph 3.16 of the orders) the claimant was to set out the factual details around his objection to the selection pool chosen by the respondent for the redundancy process.
2. Following receipt of the applicant's application to amend dated 17 September 2021, by email dated 8 October 2021 to the claimant the respondent set out its objections to the proposed amendments by the claimant as well as a skeleton argument which Mr Wilkson helpfully produced for the purposes of this hearing and which had been copied to the claimant. In that skeleton argument in relation to the amendment to claim age discrimination, the skeleton argument set out reasons as to why under the **Selkent** case the amendment should not be allowed. It was noteworthy that no mention was made in the claimant's written application to amend to "age" discrimination (as opposed to discrimination in general). Had the matter proceeded I would have been minded to reject the amendment on the basis of the arguments set out in the skeleton argument (dated 11 January 2022).
3. However, matters did not proceed that far because the claimant accepted before me that the reason that no mention was made in his written application to amend to age as a protected characteristic was that he had dropped the age claim. This was because he could not prove that he had been badly treated on grounds of age. Belief was not enough, he accepted. He further added that there were no facts he could put forward to support that he was discriminated against on grounds of age. Therefore omission of the word "age" was deliberate", not a mistake. I carefully considered with the claimant whether his intention was to drop the (proposed) age discrimination amendment application and he confirmed that it was. He tentatively questioned whether he could in any event allege discrimination on a more general basis and I pointed out to him that discrimination would only be advanced before the Tribunal on the basis of some protected characteristic, such as age. He therefore accepted that amendment could not proceed.
4. In all those circumstances it was unnecessary for me to consider that aspect of the amendment application any further.

5. As regards the amendment to the unfair dismissal claim, the claimant made clear that he was not suggesting by the amendment set out at paragraph 15 of his amendment application (dated 17 September 2021) that there should have been a wider selection pool than the three buyers, including Mr Nick Riley, but he was saying that given that he had the same skill set as Mr Riley and he understood Mr Riley had been excluded from the redundancy process because of that skill set, he (the claimant) should similarly have been excluded from the redundancy process.
6. This amendment was dealt with rather more briefly by Mr Wilkinson (in paragraphs 25 to 27 of his skeleton argument). He maintained that the claimant was seeking to introduce a new element to his unfair dismissal and that this was an amendment based on new facts. Those alleged facts would have been known to the claimant at the time of the submission of his ET1. On his own account there was several iterations of that document and it must therefore be seen as one having been given careful consideration. He maintained that the amendment would broaden the scope considerably. It would likely involve examining Mr Riley's qualifications and his role in the business. It might well involve calling him as a witness. In the circumstances this aspect of the application ought to be refused.
7. My attention was of course drawn by Mr Wilkinson to the case of **Selkent Bus Company Ltd (t/a Stagecoach Selkent) v Moore** [1996] IRLR 661. In that case the Employment Appeal Tribunal reiterated that in considering an amendment application, all the circumstances should be taken into account and that injustice and hardship should be balanced. An exhaustive list of the relevant circumstances was impossible but of relevance was certainly the nature of the amendment, the applicability of time limits and the timing and manner of the application. The Presidential Guidance Note number 1 is to similar effect adding that the Tribunal ought to draw a distinction between amendments adding or substituting a new claim arising out of the same facts and those that add an entirely new claim unconnected with the original claim. Pursuing different heads of claim even arising out of broadly similar facts may not be relabelling where it involves different tests or factual enquiry: **Reuters Ltd v Mr Cole** [2018] UK EAT/0258/17/16 02 (paragraph 28).
8. In my judgment while it is right that the additional aspect of the unfair dismissal claim could have been added to the claim when it was issued, that is often the case with amendment applications. This aspect of the amendment application is in a very different bracket from the original application to amend on grounds of age discrimination or other discrimination.
9. In reality it is a further aspect of the unfairness of the selection process which is already in the original claim. Overall, I regard the nature of the amendment as related to the existing facts set out in the claim form. While the factual enquiry will be somewhat extended it does not engage a substantial consideration of further legal principles.
10. Applying the broader **Selkent** approach (which has been approved in many cases since) I should look at competing prejudice and hardship. In my judgment it would be prejudicial to the claimant not to be able to rely on this additional aspect of unfairness in regard to the redundancy process and hamper his presentation of the case regarding procedural unfairness. I do not regard that there would be substantial or at least "outweighing" prejudice to the respondent if the additional aspect was allowed to be put forward at this stage. It would not

affect the hearing date June 2021. There was no suggestion that the resources of the respondent were such that it would not be able to prepare properly for this aspect of the case. In my judgment it is a relatively minor addition to the claim involving some additional work on the part of the respondent, not such as to substantially prejudice its position.

11. As for Mr Wilkinson's submissions in relation to applicability of time limits and he (rightly in my judgment) said if it was a new claim then it was plainly out of time but if it was merely an extension or further and better particulars of an existing claim then it was within time.

Given that I regard this amendment as being an extension of an existing claim then it follows that I do not regard it as being out of time for the purposes of this application. As to the manner of the application, the claimant gave an explanation why it was brought only now. It seems to have thought of it as one stage and then put it to one side. While this was not satisfactory, in the overall exercise of my discretion I do not regard this as being a factor of such moment that it should change my view as to the overall balance of prejudice and hardship

12. In my judgment the hardship to the claimant would be greater if I did not allow the amendment than the prejudice to the respondent if I allowed the amendment. Accordingly, I permitted this amendment to be made.

Employment Judge Bloch QC

Date signed: 15 February 2022

JUDGMENT SENT TO THE PARTIES ON

25/2/2022

N Gotecha

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.