



EMPLOYMENT TRIBUNALS

Claimant: Ms T Araoye

Respondent: Westminster City Council

Heard at: London Central

On: 23 – 25 January 2023

Before: Employment Judge Khan
Ms L Jones
Mr P de Chaumont-Rambert

Representation

Claimant: In person

Respondent: Mr H Zovidavi, counsel

Our decision having been given orally on 24 January 2023 and written reasons having been requested, the following reasons are provided in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013:

REASONS

1. In determining the claimant's application to amend the claim we were mindful of the following legal principles:
 - (1) A tribunal must conduct a careful balancing exercise of all relevant factors. In Selkent Bus Co v Moore [1996] ICR 836, the EAT outlined the following three factors: (i) *the nature of the amendment*, in particular whether it was, at one end of the scale, a mere relabelling of facts already pleaded, or at the other, a wholly new claim; (ii) if a new cause of action is being raised, *the effect of the amendment on a time limit*, in particular whether made out of time; and (iii) *the timing and the manner of the application*. These are examples of factors that may be relevant to an application and should not be taken as a checklist.
 - (2) Where an application raises arguably new causes of action a tribunal should also consider the extent to which the new complaints are likely to involve substantially different areas of enquiry and the greater the differences between the factual and legal issues raised the less likely it will be permitted (see Abercrombie v Aqa Rangemaster Ltd [2013] EWCA Civ 1148, CA).

- (3) In Vaughan v Modality Partnership [2021] IRLR 97, the EAT underlined that the core test is the balance of hardship and injustice in allowing or refusing the application which it explained in the following terms: “what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding.”
2. We refused the claimant’s application because, overall, we were satisfied that the respondent would suffer the greater hardship and injustice if the application were granted than the claimant would suffer if it were refused, having considered the following factors:
 - (1) This was a written application made by the claimant on 10 October 2022.
 - (2) We were satisfied that the nature of the application was to add a new cause of action premised on new facts.
 - (3) If permitted, it would involve a substantial new area of factual enquiry i.e. the basis on which Mr Bradley was awarded performance related pay of £3072 in 2008 and in consequence was assimilated that year on to spinal point 3 of band 4 of the pay scale in the same year, and the basis on which the claimant was appointed in 2016 on spinal point 2 of band 4.
 - (4) The complaint was substantially out of time.
 - (5) Although the claimant had made her application on the same date on which she received confirmation from the respondent that Mr Bradley was paid on a higher spinal point than she was, it was relevant, in our judgement, that she had already suspected a disparity in their pay, had alluded to this issue in an earlier draft version of the list of issues and this issue had been discussed at the preliminary hearing on 1 September 2022 in respect of which Employment Judge Snelson observed “[it] seemed to suggest a fresh claim to do with remuneration” and noted that the claimant had not made an application to amend her claim and explained the steps needed to make such an application (comment 4, Case Management Order dated 1 September 2022) – this was consistent with the claimant’s concession before us that the amendment sought amounted to a new complaint based on new facts.
 - (6) By refusing the application the claimant would suffer the hardship that she would lose the right to advance this complaint and to recover any relevant damages if successful (in this jurisdiction), whereas, if it were granted, the respondent would suffer the hardship of being required to defend a new complaint based on new facts which was prima facie out of time by more than a year.
 - (7) The claimant would not suffer any forensic prejudice if the application were refused, whereas, we were satisfied that the respondent would face some practical difficulties if required to defend this new complaint because we accepted what Mr Zovidavi, for the respondent, told us (having made the enquiries we ordered the respondent to make) which was that Mr Bradley was unlikely to be able to give cogent evidence or provide any additional documents and there was a paucity of documentary evidence

relevant to the events which led to the 2008 pay arrangements. We noted our reservations about the respondent's failure to undertake its own investigations prior to the hearing in response to the claimant's application and that whilst it had taken the steps it had in the limited time available, in compliance with our order, it was unable to come before us with a definitive position, however, we were satisfied from what Mr Zovidavi told that the respondent would be caused real practical difficulties in defending the claim were the application permitted. It was also relevant that we conducted this assessment at a preliminary stage of the final hearing when we anticipated that we would be able to proceed to hear all the evidence in this trial window.

3. The claimant then emailed the tribunal at 5:42am the next morning, on 25 October 2022, forwarding an email dated 10 October 2022 from the respondent's solicitor which she asked to be added to the hearing bundle and on which basis she sought a reconsideration of our decision to refuse her amendment application. The claimant sent a second email to the tribunal at 5:47am the same morning when she stated "In addition to the ET1 states that I have ticked a claim for sex discrimination and this is bracketed to include Equal pay. I do not believe that the application is out of time" (with which she forwarded the same email sent by the respondent on 10 October 2022 together with her reply of that date). When we queried this second point with the claimant on the resumption of the hearing, she told us that she had mistakenly agreed that the equal pay complaint was a new complaint based on new facts when making her application to amend the claim.
4. We treated the claimant's application as one to set aside the order we had made to refuse the amendment application under rule 29 which provides that an order may be varied, suspended or set aside where it is in the interests of justice which will apply where (1) there has been there has been a material change of circumstance or (2) the factual basis on which the original decision was made is found to have been misstated or (3) some other rare or out of the ordinary circumstance exists (see *Serco Ltd v Wells* [2016] ICR 768; and *Liverpool Heart and Chest Hospital NHS Foundation Trust v Poullis* [2022] ICR 75).
5. We refused this application because:
 - (1) The emails dated 10 October 2022 on which the claimant placed reliance had already been considered by us when we had determined the claimant's amendment application so that they were neither new material nor amounted to a change of circumstances warranting setting aside our order.
 - (2) Although the claimant ticked the relevant box in 8.1, regardless of the claimant's initial concession or her purported withdrawal of the same, we were satisfied that the claim did not include the facts of an equal pay complaint. It was relevant that the claimant had attended two preliminary hearings when the issues in the claim were discussed and when at the second of these hearings, on 1 September 2020, she had agreed to the respondent's draft list of issues which did not include the equal pay issue in respect of which

EJ Snelson had identified the need to make an amendment application to add “a fresh claim to do with remuneration”.

Employment Judge Khan

Date 06.03.2023

REASONS SENT TO THE PARTIES ON

06/03/2023

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FOR EMPLOYMENT TRIBUNALS