



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**Respondent**

**AND**

Mrs J Ramsey

South London and Maudsley  
NHS Trust

## RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A PRELIMINARY HEARING

**HELD AT** Croydon

**ON** 1<sup>st</sup> December 2020

**EMPLOYMENT JUDGE** A Richardson

### Representation

**For the Claimant:** in person

**For the Respondent:** Mr Conor Kennedy, Counsel

## JUDGMENT

### **The Judgment of the Tribunal is that**

- (1) it is not just and equitable to allow amendment of the Claimant's application to include claims of race discrimination.
  
- (2) The Claimant's application is dismissed.

## REASONS

### **The issues**

1. The Claimant's claim was initially for breach of contract. She applied to amend the claim on 14<sup>th</sup> May 2020 to include a claim of race discrimination and on 13<sup>th</sup> August 2020 withdrew the claim of breach of contract. On 13<sup>th</sup> and 18<sup>th</sup> August 2020 the Claimant expanded the scope of the amendment application. The issue before me is whether to allow the Claimant's amendment applications.

### **Proceedings and Evidence**

2. This three hour hearing due to start at 10am was about an hour late starting because of an administrative mix-up with CVP Rooms. I was not provided with all the relevant documents for the hearing until nearly 12 noon. I therefore reserved judgment in order to read all the documents before reaching any decision. I heard evidence from the Claimant and submissions from both parties.

3. Findings of fact are made on the basis of the Claimant's evidence and the documentary evidence. The burden of proof is the civil standard, the balance of probabilities.

### **Relevant facts**

4. The Claimant was employed by the respondent hospital trust from June 2011 to 31<sup>st</sup> January 2018. Her employment was terminated under the Respondent's Mutually Agreed Resignation Scheme (MARS) and a settlement agreement (the Settlement Agreement) was signed by both parties on 21<sup>st</sup> December 2017.

5. Under the settlement agreement the Respondent agreed to provide a reference for the Claimant in response to a request for a written reference from a prospective employer.

6. The Claimant applied for a role within the respondent's organisation on 14<sup>th</sup> May 2019. Whilst the Claimant was successful in passing through the first automated sift of applicants, and was provisionally offer the post subject to pre-employment references, her job application was ultimately rejected on 22<sup>nd</sup> July 2019 on grounds related to the alleged unsatisfactory pre-employment checks undertaken. More specifically the reference given by her former manager who, when asked whether he would re-employ the Claimant, stated that he would not.

7. The Claimant is an experienced Trade Union representative and by her own admission, she had an understanding of employment law and what amounted to race discrimination. She sought advice from the Trade Union and also from a firm of solicitors. The Claimant focussed her attention on what she believed to be a breach of the Settlement Agreement by the failure to give the Claimant a positive reference.

8. ACAS Early Conciliation was commenced on 2<sup>nd</sup> August 2019 and the Early Conciliation certificate was issued on 5<sup>th</sup> August. On 2<sup>nd</sup> August 2019 the Claimant filed a complaint of breach of contract. The ET1 form did not make any mention of race discrimination. It focussed entirely on the alleged breach of contract - a breach of the Settlement Agreement. There was no tick next to race discrimination in box 8.1 on the form. The grounds of complaint state at Box 8:

*"BREACH OF CONTRACT*

*Breach Of Settlement Agreement contract by not providing a fair reference to secure future employment.”*

9. The grounds of complaint state:

*“The reason for this Claim is to seek redress and to enforce the terms of a Settlement Agreement (SA) .... entered into 30-Jan-2018 between myself and South London & Maudsley NHS Trust.*

*I have taken this to Employment Tribunal also because a derogatory comment appears to have been made, breaching the terms. [Reference document requested SLAM]*

*This claim implicates Sally Dibben, Head of Human Resources who negotiated the SA and involved in giving me a “shoddy reference” so I would not be accepted for this role*

10. The claimant sums up in her grounds of complaint that:

*“SLAM is responsible for this act and omission in not providing a fair reference. It has caused me financial reputational harm. I now feel embarrassed of what the recruiting manager must think of me; after being pleased to recruit to this role, eager for me to start and now this did not happen.”*

11. Under ‘Remedy’ the Claimant required a claim for damages for breach of contract, a claim for damages for loss and an award as the Tribunal saw fit. She wanted to be given the job she had applied for and/or payment to retirement age together with a fair reference in the future should it be required. Finally, the Claimant stated that she wanted *“Not to be pick [sic] on by SLAM staff – to be treated with dignity and respect as others”*.

12. The relevant term of the Settlement Agreement was

*“The Employer agrees to provide a reference on Trust headed paper in respect of any request for a written reference from a prospective employer of the Employee. Such reference will be given within a reasonable period of a request being received.”*

13. Essentially the Claimant’s complaint in these proceedings related to a negative reference being given by a former manager of the Claimant during the Respondent’s internal recruitment process being a breach of the Settlement Agreement.

14. In its ET3 grounds of resistance the Respondent asserted inter alia that the ET had no jurisdiction to hear the Claimant's complaint under S3(2) Employment Tribunals Act 1996 and Article 3 Extension of Jurisdiction Order 1994 because the contractual claim being made by the Claimant did not arise or was not outstanding on the termination of employment. Her employment terminated in January 2018 under the MARS /Settlement Agreement and her claim relates to the negative reference in July 2019, which she alleged was a breach of the Settlement Agreement signed in December 2017. A strike out application was made.

15. At a case management conference on 14<sup>th</sup> May 2020 before EJ Fowell it was established that to complain under S108 Equality Act 2010 the Claimant needed to obtain leave to amend her claim and as it was being raised long after the normal three month time limit, the Claimant would have to persuade the Tribunal that it would be just and equitable to extend time. EJ Fowell fixed the date of the application to amend for time-limit purposes as 14<sup>th</sup> May 2020.

16. EJ Fowell set out the two preliminary issues to be decided at an open preliminary hearing as (a) whether or not the Tribunal has jurisdiction to consider the breach of contract claim; and (b) the Claimant's application to amend her claim to include one of race discrimination. Issue (a) eventually fell away as explained below.

17. The Claimant was directed to set out in a statement (1) why she claims the failure of the Trust to re-employ her/provide a better reference were acts of race discrimination; (2) what were the acts or omissions in question and the individuals concerned; and (3) whether she alleges that such acts were of direct race discrimination (because of her race) or were acts of victimisation for previously raising an employment tribunal claim (in 2017), or both; and (4) why she did not raise a complaint of race discrimination earlier.

18. In response to the order of EJ Fowell, the Claimant applied to strike out the Respondent's grounds of resistance and gave lengthy, detailed grounds in support of why her breach of contract claim was justified, why the Tribunal did have jurisdiction to hear her claim and the Respondent's response should be struck out.

19. In the Claimant's 8 page statement filed in June 2020 the Claimant made no reference to race discrimination. Subsequently the Claimant added to her first statement a further 15 pages of information. This may have been added after the June 2020 case management hearing before EJ Khalil.

20. The first statement did not comply with EJ Fowell's Order of 14<sup>th</sup> May 2020.

21. At a telephone case management hearing on 26<sup>th</sup> June 2020 before EJ Khalil the matter was listed against for an open preliminary hearing to hear the Claimant's application to amend her claim to include race discrimination; and the parties' cross applications to strike out their respective claim/response. The Claimant confirmed that she would not be giving evidence at the open preliminary hearing as she had no further particulars to provide in response to the previous case management order.

22. On 13<sup>th</sup> August 2020 the Claimant made an application to amend her ET1 to include a claim for victimisation. The Claimant also confirmed that her claim for breach of contract was withdrawn. She stated:

*"Upon Reflection, the Claimant asks the Judge to Withdraw a part of the Claim - the Breach of the Settlement Agreement only, from the Employment Tribunal however, reserving the right to bring proceedings after Withdrawal in another jurisdiction. This will be a Withdrawal and not a Dismissal. I apply to Withdraw the Breach of the Settlement Agreement part of the Claim with no costs, no application to Strike Out, no Application for Deposit Order as per Respondents ET3, and last email to the court, as I was not unreasonable in bringing this Claim."*

23. The Claimant added that she would submit her amendment shortly. It was submitted on 18<sup>th</sup> August 2020.

24. The amendments to the claim were listed as:

- a. To correct an administrative error in not ticking the box for race on the original on line ET1 due to a technical error;
- b. Adding further factual details to existing allegations;
- c. To withdraw the existing claim of breach of contract (of the Settlement Agreement);
- d. And direct discrimination with reference to a hypothetical comparator;
- e. Victimisation;
- f. Negligence;
- g. Vicarious liability; and
- h. Harassment.

25. At page 88 of the Updated Hearing Bundle, the Claimant set out another undated supporting statement comprising 7 pages together with documentary evidence in support. I take this to be an attachment to the information sent by the Claimant with the 18<sup>th</sup> August 2020 email.

26. On 19<sup>th</sup> June 2020 both parties had submitted skeleton arguments for this Open Preliminary Hearing which was for the telephone case management hearing but now included in the Updated Bundle for the current hearing.

27. Nowhere in any of the Claimant's applications to amend and her supporting statements/documents does the Claimant explain why she did not bring a claim of race discrimination within her original application to the Employment Tribunal.

### **Submissions**

28. I heard oral submissions from both parties. I have retained a full note of their submissions on the Tribunal file. I took the submissions into account including the written submissions into account in my deliberations.

### **The Law**

29. Where a claimant wishes to amend his or her claim form (ET1) the Tribunal has a discretion whether to grant or refuse the amendment to the substance of the pleaded claim.

30. Under its general powers to regulate its own proceedings and specific case management powers the Tribunal can consider an application to amend a claim at any stage of the proceedings (Presidential Guidance March 2014).

31. The Employment Tribunals have a general discretion to grant leave to amend a claim. The leading authorities are **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 65** and **Selkent Bus Co v Moore [1996] IRLR 661**. In **Selkent Mummery J**, (as he then was) the 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:

“(4) 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.

(5) 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**

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**

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 eg, in the case of unfair dismissal, S.67 of the 1978 Act.

**(c) The timing and manner of the application**

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."

**Conclusions**

32. Before even beginning to consider the **Selkent** principles, I consider the Respondent's submission that the Claimant, having withdrawn her claim for breach of contract of the Settlement Agreement on 13<sup>th</sup> August 2020, had in law, no claim left to amend.

33. The Respondent had not found any case law on the point but as a matter of logic, it was submitted, there was therefore nothing before the Tribunal to consider amending. Reminding myself of the chronology, the claim form was filed on 2<sup>nd</sup> August 2019; the first application to amend was fixed as 14<sup>th</sup> May 2020 by EJ Fowell although the first application particulars followed later; and the withdrawal of the only claim in the claim form (breach of contract of the Settlement Agreement) was made on 13<sup>th</sup> August 2020.

34. The Claimant expressly stated that she was withdrawing her breach of contract claim reserving her right to litigate it in another jurisdiction presumably the County Court. Although the Respondent requested in writing a dismissal judgment, none was made. Therefore in order to restore her breach of contract claim in order to amend it, the Claimant needed to make an appropriate application. There was no such application. The Claimant stated in writing more than once that she withdrew her breach of contract claim and that she wished to

amend her claim to include one initially of direct race discrimination and victimisation, and subsequently, to include other claims.

35. I find that at this preliminary hearing, there was no claim before me to consider amending. It had been withdrawn although not dismissed. As a matter of legality, although an application to amend had been made prior to the application to withdraw, the only claim before the Tribunal, once the withdrawal of the breach of contract had been made, no longer existed unless a restoration application had been made to the Tribunal *and granted*. No such restoration application was made and granted, and therefore the application to amend had nothing to bite on and cannot proceed.

36. However, if I were to be wrong on that conclusion, and in order to assist the Claimant in seeing that she has not been unjustly denied access to justice by a quirk in the Tribunal Rules or incorrect application of law, I have gone on to consider the application to amend, in the unlikely event that the application was 'live' at this preliminary hearing despite withdrawal of the original breach of contract claim.

37. At this hearing, the Claimant, having previously stated to EJ Fowell that she did not wish to give evidence at the Open Preliminary Hearing, was not sworn in; however her submissions did to a degree inevitably take the form of evidence. The Respondent raised no objection and, bearing in mind the Claimant is a litigant in person, I accept her comments, which I have recorded as her evidence, with particular emphasis as to the reason why she did not raise a complaint of race discrimination in her ET1 grounds of complaint.

38. Applying the **Selkent** principles to the facts, the first question is what was the nature of the amendment? The Claimant's original claim was for breach of contract. The application to amend dated 14<sup>th</sup> May 2020 was to include a claim of race discrimination with particulars of direct discrimination and victimisation being subsequently provided. The Claimant submits that race discrimination was not a new claim. She submitted that her failure to 'tick' the race discrimination box on the ET1 on 2<sup>nd</sup> August 2019 was an administrative error which must have occurred because of technical difficulties. She stated that she always intended to bring a complaint of race discrimination and that it was in her mind when she filed her complaint. I could accept that as a possibility if the Claimant had made any reference, no matter how oblique, in the grounds of complaint narrative to race discrimination. There was nothing to put the Respondent on notice of a race discrimination claim. The particulars of race discrimination were not provided until after the Claimant had seen the Respondent's grounds of resistance and after the case management discussion on 14<sup>th</sup> May 2020, more than 9 months after the ET1 was filed.

39. I find it cannot be argued that the application to amend to include claims of race discrimination was anything other than a substantial new cause of action.



40. Then I consider the essential question of time limits. The claim is out of time by more than 9 months, taking the date of the first case management discussion as the date fixed by EJ Fowell as the date of the amendment application, although the particulars came later in June and August 2020. The Respondent submitted that the Claimant never intended to make a race discrimination complaint when she submitted her claim for breach of the Settlement Agreement. She was now bringing race discrimination complaints because the Tribunal had no jurisdiction to hear the complaint of breach of contract as the alleged breach was not outstanding on termination of employment. The Respondent alleged this application was a device by the Claimant in order to keep her claim in the Tribunal alive.

41. I asked the Claimant why she had not filed her race discrimination complaints in the ET1 in August 2019? She stated that she believed she had ticked the race box 8.1 in the form. She said *"I am a TU rep... I know about race discrimination and knew to tick the box. I believed the box was ticked on the ET1 ... it was my honest belief it was ticked."*

42. As to why there was no mention of race discrimination in the narrative of the ET1, the Claimant explained that she had "made an error" in not including her complaints of race discrimination in the grounds of complaint narrative.

43. The Claimant had taken advice from the TU in February 2020 but she had also taken solicitors' advice earlier, initially in May 2019. The Claimant said she had visited the solicitors twice and had two phone calls with them, the last being after the June preliminary hearing in 2020. The initial advice had focussed on the breach of contract of the Settlement Agreement.

44. The Claimant was an experienced TU representative, having represented other employees at MARS meetings. She knew what race discrimination was and had in fact brought earlier Tribunal Proceedings in 2017 for race victimisation which had been settled. I conclude that the Claimant did not intend to bring race discrimination in her breach of contract claim as she makes not the slightest reference to it. The Claimant knew about time limits. Her explanation as to why she filed late was not at all persuasive. Essentially her evidence is that she intended to and thought she had. Given her experience and her access to legal advice, I find on the evidence and applying the civil standard of proof, that the Claimant did not bring a complaint of race discrimination in any of its forms because it was not in her mind in at the time. It only came to the forefront of her mind when she realised that the Tribunal had no jurisdiction to hear her claim of breach of contract. The fact that the Claimant only then brought claims of race discrimination lend some weight to the Respondent's submission that she was doing so to keep her ET claim alive.

45. The time limits on filing a claim are strict and there is no presumption that time will be extended. The Tribunal cannot hear an out of time complaint unless the applicant convinces the Tribunal that it is just and equitable to extend time: **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434.

46. The burden was therefore on the Claimant to provide me with an explanation as to why she did not bring her claim within time. I bear in mind the relevant dicta in **British Coal Board v Keeble**. The delay is in excess of 9 months, with particulars first being provided some 10 months after filing, and in stages with the scope of the claims increasing with each batch of supporting evidence (which also goes to the timing and manner of the application). The Claimant has not provided sufficient evidence or explanation for the omission of race discrimination from her claim form on 2<sup>nd</sup> August 2019 and has also provided no plausible explanation for her late application to amend.

47. Finally, I consider the balance of hardship and injustice to the parties if I allow or disallow the amendment applications. The Claimant avows that she will be pursuing her complaint of breach of the Settlement Agreement in the County Court. That was her principle claim for over 12 months. The Respondent NHS Trust currently faces no live claim from the Claimant in the Employment Tribunal unless time is extended for the admission of the amendments. The new claims being pressed forward by the Claimant are many; they lack structure and clarity and will incur the Respondent in significant time and expense in defending them, even after they have been identified and summarised into a comprehensible list of issues. I find therefore that the lateness of these new claims causes the Respondent significantly greater injustice and hardship which is not outweighed by the Claimant being denied the opportunity to pursue claims of race discrimination in these proceedings; race discrimination I have found was not in her mind when she originally sought professional legal advice and did not occur to her until after the Respondent's response was filed.

48. The Claimant's original and subsequent amendment applications are all refused.

49. The Claimant's application to strike out the Respondent's response falls away in the light of this decision. It was in any event misconceived.

50. I make no judgment on the withdrawal of the original claim.

Signed by \_\_\_\_\_

Employment Judge Richardson  
Signed on 9<sup>th</sup> December 2020