EMPLOYMENT TRIBUNALS

Claimant:	**Mr F Dela Cruz**	
Respondent:	**B Braun Avitum UK Ltd**	
Heard at:	**Cardiff (in public, by video)**	**On: 26 March 2024**
Before:	**Employment Judge C Sharp**	

Representation:
Claimant: In person
Respondent: Ms S Ellison (Solicitor)

Decision having been sent to the parties on 27 March 2024 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The Claimant submitted an application to amend his claim in several respects on 6 February 2024. The Claimant sought to amend his claim by making typographical amendments to his grounds of complaint (the Respondent does not object; the Tribunal therefore will consent to these amendments). A helpful list has been provided by the Respondent in its letter of 19 February 2024; in essence these amendments centre on clauses 5, 7.5.26, 7.5.57, 7.5.59, 10.18 and 10.25 of the Grounds of Complaint (as currently drafted) where the Claimant wants to add words such as "*partially*" and "*limited*". [Judge's note - Since handing down this Judgment orally, I have seen the updated grounds of complaint provided by the Respondent's representative and approved them – the numbering is different in this version due to the consequences of my amendment decision]

2. Originally, it was understood that the Claimant sought to add 21 more breaches of contract to the constructive unfair dismissal claim, to which the Respondent objected. However, during the course of the hearing, the Claimant told me repeatedly that he was not seeking to add these allegations to the claim before the Tribunal. I clarified with him that this was the case, as his email and the list of additional claims he wrote that he wanted to add did set out these allegations in detail. The Claimant was adamant that he did not wish to do so. I acknowledge that there is a logic to this position – the Claimant only discovered these points after receiving the outcome between September 2023 and January 2024 to a DSAR he made to the Respondent; he did not know about these matters when he resigned. Therefore, the Claimant could not have had them in his mind when he resigned.

3. As a result, I did not treat the Claimant as applying to amend his constructive unfair dismissal claim. In addition, I explained to him that he was not entitled to a right of reply to the Grounds of Resistance of the Respondent and to change the grounds of complaint in order to do so. The way to address factual matters is either through his witness statement or by asking questions of witnesses or by making submissions based on the evidence in the hearing bundle. The Claimant is not permitted to amend his grounds of complaint to add new commentary or include matters arising from the DSAR of which he is now aware if they are not the basis of a claim before the Tribunal. I reminded the Claimant that he should focus on setting out the facts (including relevant background information) in his witness statement and his arguments in his submissions at the end of the final hearing.

4. That therefore means what I had to determine today were two points:

    a. can the Claimant add 19 more allegations of direct race discrimination to the current list of allegations of direct race discrimination?

    b. can he add a new claim of harassment under s26 Equality Act 2010?

    The summary of the new allegations and claim the Claimant wanted to add was usefully set out in a document sent by the Claimant entitled "*Applied ET1 correction/additional claim and list of events forming parts of the claims – pending approval"* dated 6 February 2024 (he also provided a marked up draft amended grounds of complaint).

Law

5. The principles that govern applications to amend were summarised by the Employment Appeal Tribunal in Cox v Adecco UK Limited and others [2023] EAT 105 as follows:

"6. The importance of the accurate pleading of a claim before the ET was stressed by the EAT in Chandhok v Tirkey [2015] ICR 527; as Langstaff J observed:

"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made—meaning … the claim as set out in the ET1"…

8. As His Honour Judge Tayler observed in Vaughan v Modality Partnership [2021] IRLR 97 (see paragraph 12), the approach to be adopted to deciding whether or not to exercise the discretion to allow an amendment has its origin in the National Industrial Relations Court decision in Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650, where it was stated (see p 657B-C):

"In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."

9. In [Selkent Bus Co Ltd v Moore [1996] ICR 836, [1996] IRLR 661] it was similarly said that regard must be had to "all the circumstances", in particular any injustice or hardship which would result from the amendment or a refusal to make it. In providing guidance as to the kind of factors that would be relevant, Mummery J suggested these would include (non-exhaustively) the nature of the amendment sought, the applicability of time limits, and the timing and manner of the application, whilst emphasising:

"… the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment."

10. In later cases, it has been confirmed that the guidance in Selkent was not intended to be a box ticking exercise, but a discussion of the kinds of factors likely to be relevant when carrying out the required balancing process; see Abercrombie v Aga Rangemaster Limited [2013] EWCA Civ 1148, per Underhill LJ at paragraph 47, and Vaughan at paragraph 16.

11. Where the proposed amendment simply amounts to a re-labelling of facts already pleaded, it will generally be readily permitted. Even, however, if it would introduce a new complaint or cause of action, the ET still has a discretion to allow the amendment; see Underhill J (as he then was) at paragraph 13 Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07

(6 June 2007, unreported). That is so even where (as here, see section 48(3) ERA) the statutory test to be applied in determining whether to extend time would be of reasonable practicability rather than considering what would be just and equitable. In carrying out the balancing exercise it is required to undertake, the ET's approach should be informed by the substance of the amendment, not merely its form; as Underhill LJ stated in Abercrombie:

"48. … the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted: see the discussion in Harvey on Industrial Relations and Employment Law para. 312.01-03."

12. And as HHJ Tayler cautioned in Vaughan:

"21. … Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, 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. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim."

13. The focus on the practical consequences of allowing or refusing an amendment requires the ET to determine whether - and, if so, how - it is actually of importance to the claim or defence that the amendment be allowed. That can then be weighed in deciding where the balance of justice lies. Examples provided in Vaughan provide a helpful illustration of this point:

"24.1. A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.

24.2. An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

24.3. A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs."

However, as the EAT then went on to observe:

"25. No one factor is likely to be decisive. The balance of justice is always key.""

6. In Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132 the Employment Appeal Tribunal confirmed that the potential merits of a proposed complaint may also be a relevant consideration. However, any such assessment must be properly reached by reference to identifiable factors that are apparent at the preliminary hearing and taking proper account of the fact that the tribunal does not have all the evidence before it and is not conducting the trial.

Analysis

7. Having considered the relevant factors, I concluded that I would refuse the Claimant's application to amend his claim for both the additional claims of direct race discrimination and to bring the harassment claim.

8. Dealing first with the application to bring 19 additional allegations of direct race discrimination, these are new claims not within the ET1. While the ET1 does mention the submission of a grievance letter by Chloe O'Grady on or around 11 October 2022, a claim that the Claimant seeks to add is that that DW (Deanna Webber) actually reviewed the grievance letter and gave feedback on it before it was then officially submitted. I proceeded on the basis that all the additional direct race discrimination claims were new and not within the ET1.

9. I acknowledge that there is a claim for direct race discrimination already before the Tribunal; however, the inclusion of 19 more allegations based on different facts would be a substantial expansion of the current claim. As *Abercrombie* noted, permitting the additional claims is likely to involve substantially different areas of enquiry than the original claim.

10. In terms of the timing of the application, the Claimant explained that the reason they were not in the original claim form was because he said he was unaware of the matters until he reviewed the outcome of the DSAR. The Claimant did not provide with any evidence on this – the Tribunal does not know exactly what he received or when from the DSAR. The Claimant's oral evidence was that he had the information drip fed to him from a period of about September 2023 to January 2024, but due to the lack of evidence and specificity about what he

found out and when, I did not know whether the evidence/information was received as far back as September 2023 or received as late as January 2024. This is significant as it covers a 4-month period of time when the Claimant was allegedly receiving the outcome of the DSAR, and the time limit to present claims are 3 months minus a day from when the act happened. Allowing for the argument that until the Claimant is aware of whatever he seeks to complain about, it is more likely to be just and equitable to extend time, knowing exactly what the Claimant knew, and when, is essential. When considering the "just and equitable" extension of time test that applies to discrimination cases, the Claimant did not give any evidence of any reason why it would be just and equitable; he has told his story and left it at that.

11. It means that in my view, the issue of the timing of the application and time limits generally are closely connected. I was not assisted by the Claimant in understanding why the application was not made until 6 February 2024. I do not know if the application was made promptly. The claims appear to be out of time and the Claimant has not persuaded me that it is just and equitable to extend time.

12. I then considered the issue of merit. Often, the question as to whether there are merits in a potential claim is best left to a Final Hearing after all the evidence is before the Tribunal and subjected to submissions. Sometimes, the issue of merit and reasonable prospects of success is considered in a preliminary hearing specifically listed to consider a strike out judgment or a deposit order; such hearings should not turn into a mini-trial. This application is a rare exception in my judgment because when I consider the additional direct race discrimination claims that the Claimant wants to add, at no point does he explain in any way how they occurred because of his race as an Asian Philippino person. It is a fundamental tenet of discrimination law is that a Claimant cannot simply rely on the fact that they are of a particular race and assert that is enough to permit a Tribunal to find discrimination. There needs to be something more to enable the burden of proof to shift to the Respondent. I asked the Claimant about this more than once, and he was unable to explain the link to his race.

13. When I considered the specifics of what the Claimant wanted to add, they did not in my judgment obviously amount to discrimination or less favourable treatment due to race. One example was the allegation that on 15 December 2022 the Respondents were already planning (with their script to suspend) to call the Claimant the following day 16 December 2022 for a disciplinary investigation but it did not happen. What is the less favourable treatment if nothing happened? What the Claimant is asserting is that the Respondent did not do the thing that he did not want it to do and there is no explanation how his race is relevant.

14. I accept that some of the new allegations include matters that potentially could be less favourable treatment, such as Chloe O'Grady submitting a grievance letter that has been edited by DW. Again, I do not understand on what basis it is argued that it has happened because of the Claimant's race. As a result, I concluded that the additional claims of direct race discrimination appear to have no merit.

15. I also considered the balance of prejudice. When I asked the Claimant about this, his answers were confused and talked about being able to rely on particular evidence at the final hearing and the difficulty of agreeing the contents of the hearing bundle. The Claimant said that he wanted to clarify matters. I did ask the Claimant about this more than once and explained the relevant principles again, but the Claimant was not able to direct me to any prejudice he would suffer.

16. In contrast, the Respondent's representative submitted that if the amendment was granted, it would be put to considerably greater expense and there was a 6-day final hearing due to start in May 2024. By this point of time, the claim should be clear and not subject to change, and the hearing bundle should be close to being agreed. Ms Ellison on behalf of the Respondent noted that if the application was granted, it would have to call more witnesses, collect additional evidence, and entail further discussions between the parties. Ms Ellison indicated that as I put it during the course of the hearing the Claimant seemed to be struggling to see the wood from the trees. Expanding the claim would increase the costs and difficulties for the Respondent in dealing with an unrepresented Claimant who is struggling to focus on what is relevant. Ms Ellison also noted that the Claimant had not been able to explain any link to his race, which if the amendment was granted would inevitably lead to a request for further and better particulars.

17. Stepping back and considering what is in the interests of justice, I concluded that it was not in the interests of justice for me to permit the additional direct race discrimination claims to proceed. The claim would be substantially expanded, putting the final hearing dates at risk, the Claimant has not persuaded me why it would be just and equitable to extend time, the claims appear to have little or no merit for the reasons outlined above, and the Respondent would be put to considerable prejudice.

18. I reached the same conclusion to refuse permission to allow the Claimant to bring the harassment claim, but for different reasons.

19. The Claimant was not relying on the DSAR to explain why the harassment claim was not within the claim form. Harassment is a completely different claim to the claims currently before the Tribunal, with different relevant legal principles and evidence required. I accept that factually all of the information he relies upon were set out within the original grounds of complaint. There is

one slight exception which is allegation 3(d)(xx) (in the list of additional claims), which is mentioned in the summary of events for unfair dismissal but not specifically pleaded as a claim.

20. The Claimant's claim form set out clearly the heads of claim he wished to be determined by the Tribunal; harassment was not one. It was evident that the Claimant had considered the Equality Act 2010 and chose the heads of claim that he wished to pursue when presenting his claim to the Tribunal. As Ms Ellison submitted, just because an event is mentioned in a claim form, it does not mean that a claim has been brought about it. I bore in mind that Employment Judge R Harfield had closely examined the claim at the case management preliminary hearing on 18 January 2024 and found that the Claimant had not brought a claim of harassment. The elements of harassment were not within the original grounds of complaint.

21. Harassment is unwanted conduct that relates in this case to race. It is not enough therefore for the conduct complained of to be unwanted, it must relate to the protected characteristic. To use an example from a sex case, saying to a lady that she looks very attractive today is not openly making a sexual comment but one can potentially draw a line between that comment, which is the unwanted conduct, and to her sex because it could be a comment that could be related to her sex or of a sexual nature for example.

22. The allegations that the Claimant complains of as harassment do not set out any link to race. One example is that he alleges on 4 October 2022 he withdrew from mediation and requested instead for a formal disciplinary hearing so the Claimant could present his case properly. DW allegedly threatened him to prepare for a counter grievance that would be lodged against him. There was nothing in those words in my view, that could reasonably be read by an objective person as having any relationship to race.

23. If I look at another example, on 22 November 2022 the Claimant asked for a copy of Chloe O'Grady's grievance letter with his notes written on it but was denied. MK allegedly said that she would give him the copy but would ask Vanessa first. The Claimant complains that he did not receive such document until he asked for a copy from LR days before the first disciplinary meeting. There is nothing here that relates to race at all.

24. Consequently, I agreed with Ms Ellison's submission that the harassment claim was a wholly new claim, and it was not re-labelling what was before the Tribunal.

25. In terms of the timing of the application, the Claimant himself said that the DSAR was not relevant, and he knew all of the matters on which he relies for the harassment claim when he presented his claim. He did not explain why harassment was not listed as a claim in the original grounds of complaint or

why he delayed in making the application to amend until 6 February 2024. The Claimant gave evidence that he was supported by a Union and had representation through the Union throughout the period of his employment and for a short period after he left his job. I understood his point that having lost his job he was unable to continue to pay the subscriptions, but that did not change the fact that he did have Union support.

26. The Claimant also talked about accessing advice through his insurer, about contacting ACAS, about his research and access to the internet. Mr Dela Cruz is an educated and intelligent individual who was able to learn about the Equality Act and potential claims that he could have brought. I consider that not only is the claim of harassment out of time, but there was no explanation before me why it was not in the original claim form or why it would be just and equitable to extend time. I decline to extend time in the circumstances.

27. I reiterate my findings about merit – there is no explanation how the harassment allegations relate to race, and it is not obvious on the face of the allegations. My findings about the balance of prejudice for the additional direct race discrimination claims apply equally to the harassment claim. I am not persuaded that the balance of prejudice is in the Claimant's favour; it is in the Respondent's favour. Stepping back again, I do not consider it to be in the interests of justice to allow the Claimant to amend his claim to bring a new harassment claim that appears to have little or no merit, which has been brought outside of the statutory time limit and for which time has not been extended, which would cause the Respondent prejudice and imperil the listed final hearing.

Employment Judge C Sharp
Dated: 24 April 2024

REASONS SENT TO THE PARTIES ON 7 May 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche