Tackling amendment applications: lessons for practitioners

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Stephen Wyeth analyses CX v Secretary of State for Justice [2025] EAT 114 to identify what practitioners might glean from this latest decision on amendment applications and how best to address them.

The facts

1. This case concerns an appeal by CX, a former prison officer, against a decision of EJ Shastri-Hurst sitting in the Reading Employment Tribunal (ET) refusing her application to amend her claim to include disability discrimination under sections 15 and 20/21 of the Equality Act 2010. Having commenced employment on 16 November 2020, after relatively short service, CX was dismissed in December 2021 for the stated reason of failing her probation and initially brought claims of ordinary unfair dismissal (but lacked qualifying service), sex discrimination, belief discrimination (veganism), harassment and victimisation.

2. As is not uncommon, the claim form lacked particulars and in its response, those acting for the MOJ requested further details. Accordingly, CX sent a 30-page email to the MOJ setting out a detailed narrative account of events, which raised matters not included in the claim form. There followed two case management Preliminary Hearings (PHs) in December 2022 and April 2023 respectively. At the December 2022 PH, by reference to her 30-page document, the claimant was requested to clarify which of the allegations were substantive complaints and which were relied on as background only. CX sent a further 19-page document in January 2023 endeavouring to comply with that direction. At the second PH in April 2023, all the claims and issues were discussed, identified and recorded in the record of the PH. Notably, CX was permitted to amend her claim to include overlapping whistleblowing dismissal and detriment complaints. Furthermore, a full merits hearing was listed for March 2024 and directions were set in readiness for trial including

dates for disclosure, bundle preparation and, lastly, exchange of witness statements scheduled for 16 January 2024.

3. Following disclosure taking place, CX received a copy of a note from the respondent's HR department to the prison governor (prepared for the purposes of a performance review meeting at which dismissal of CX was to be considered) dated 24 November 2021. That note referred to an earlier Occupational Health report of 24 August 2021 indicating she might be considered disabled due to depression and anxiety.

4. When exchanging witness statements (which was delayed by agreement to 16 February 2024) CX made reference to the HR note of November 2021 asserting that had she "understood the process properly and the claims available to [her, she] could also have made claims for (i) disability discrimination (for failure to make reasonable adjustments) and (ii) unfair dismissal [sic]". She sought to amend her claim to include disability discrimination, indicating that she wanted these additional claims to be considered by the ET. The respondent flagged this up in correspondence to the ET on 4 March 2024 and resisted any attempt to introduce any new matters not already identified in the agreed list of issues.

5. CX emailed the ET on 14 March 2024 referring to her application to amend and at a further PH the following day a decision was taken (for other reasons) to vacate the trial at the end of that month. At the same time, CX was ordered to send a marked up copy of her original claim form highlighting the proposed amendments and the respondent was directed to respond thereafter. A further PH was then listed to determine the application to amend.

6. At that PH, the ET refused the amendment, concluding it introduced wholly new claims (which the EJ described as ""Selkent 3" category"), which would significantly expand the legal and factual enquiry, require additional disclosure, witnesses, and hearing time, and cause hardship to the respondent. The ET acknowledged CX's lack of awareness that mental ill health could constitute a disability but found her delay in applying (four months after disclosure) unjustified. It also held that the amendment was not necessary for CX to pursue her existing claims, which already allowed for substantial remedies.

The appeal

7. CX appealed on the following four grounds that the ET erred in:

    a. concluding that the amendment was not a re-labelling exercise but introduced new claims requiring further legal and factual enquiry;

b. failing to properly take into account CX's explanation for the delay in making the application or give sufficient reasons in this regard;

c. taking into account an irrelevant factor, namely CX not applying to amend her claim at either of the first two PHs;

d. failing to take into account a material factor in the balance of hardship, namely the significance or value of obtaining a declaration of discrimination.

The approach of the EAT

8. The Employment Appeal Tribunal (EAT), presided over by HHJ Auerbach, upheld the ET's decision. The EAT found no error in the ET's reasoning, including its assessment of the nature of the amendment, timing, and balance of hardship. The appeal was dismissed.

9. Unsurprisingly, HHJ Auerbach referred to the approach set out in Selkent Bus Co Ltd v Moore [1996] ICR 386, which identifies three (non-exhaustive) primary factors for consideration: (1) the nature of the amendment, (2) the applicability of time limits, and (3) the timing and manner of the application.

10. In relation to the first of these (nature of the amendment), the decision in Selkent noted this could range from (a) the correction of clerical or typing errors, (b) addition of factual details to existing claims or relabelling of already-pleaded facts, and (c) the making of entirely new factual allegations that change the basis of the pleaded case. The EAT emphasised that these categories are illustrative and not rigid. An ET must evaluate all circumstances and balance the injustice and hardship of allowing versus refusing the amendment. This flexible approach was reinforced by Underhill J in Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148; [2014] ICR 209, where it was held that the focus should be on the practical impact of the amendment on the scope of the enquiry, rather than formal classification. Indeed, the danger of applying a 'formal classification' to an application of, say, a proposed amendment that introduces an entirely new cause of action may not be a reliable guide to what the practical impact of it would be on the scope of substantive enquiry and future conduct of the litigation. In short, it is necessary to look at the substance of the amendment and not its legal form.

11. The EAT upheld the ET's conclusion that the proposed disability discrimination claims constituted wholly new claims (Selkent category 3), which would significantly expand the legal and factual enquiry. The EAT saw no error in the ET noting that the amendment would introduce new issues such as the claimant's disability status, the employer's

knowledge of the disability, and causation or disadvantage, all of which would require additional disclosure, witnesses, and hearing time. That would have a significant impact on the litigation and cause material disadvantage to the respondent, including the problem of fading memories, the implications for time and cost needed for further investigation and preparation and additional hearing time.

12. The EAT emphasised that consideration of the "timing" of the application is different from consideration of "time limits" and was satisfied that the ET approached this correctly. The fact that the EJ noted that the new claim in the application was significantly out of time (by some two years and three months) was separate to the assessment the EJ undertook regarding the timing of the application. In particular, 'timing' may embrace matters such as the stages the litigation has gone through already, how much preparation for a final hearing had been completed and how many previous PHs there may have been prior to the application. In this case, it was highly relevant that there had been numerous PHs before the application had been made, at which the scope and nature of the claims had been specifically considered and previous amendments allowed, especially when the subsequent proposed amendment had not previously been the thrust of CX's factual case.

13. Finally, the EAT made reference to HHJ Tayler's reference in Vaughan v Modality Partnership [2021] ICR 535 to the question of whether the party seeking the amendment really "needs" rather than merely "wants" what is being sought. According to HHJ Auerbach, the ET was entitled to determine that CX did not need the amendment to be able to fully argue her existing claims even if she might not succeed in those but might possibly have succeeded in any proposed new complaint.

Lessons to be learned

14. The nature of the amendment combined with the timing of it was fatal for CX on this occasion. The fact that CX was not helped by her assertion that she did not know that poor mental health could be a disability illustrates that there is a limit to the leniency ETs may show to litigants in person. Indeed, the number of PHs and the stage reached in the litigation was of itself demonstrable of the likely prejudice to the respondent if the application was granted.

15. The respondent may have had the stronger hand in this instance but this case further develops the message from previous authorities (Abercrombie and Vaughan) that amendment applications are not a question of form over substance but must be forensically dissected to establish the practical impact of what is sought. Even now, several

years after the decision in Vaughan, some practitioners are still failing to obtain and provide necessary instructions (and, if necessary, evidence) that must be put before the ET to demonstrate the prejudice that will be caused to their respective clients if an amendment is or is not allowed. Factors such as preservation of documents, fading memories - specific to the individual rather than general assertion (e.g., due to medical vulnerability or sheer volume of managerial responsibility at the relevant time etc.) and access to witnesses (who may no longer be contactable), are all examples of matters that might need to be explored.

16. Practitioners should be prepared to argue both the necessity of the amendment and its impact on the litigation process, including disclosure, witness evidence, and hearing logistics. If acting for respondents, as part of any instructions provided, supplying the advocate with a detailed timeline of the process of litigation that they would not otherwise be aware of (e.g., dates of requests for and provision of further information, discovery of documents, late disclosure etc.) could be critical in resisting such applications.

17. Need it be said, the case also highlights the need for clarity when pleading cases. It is imperative that claims are set out succinctly and supported by specific factual allegations to avoid any ambiguity. Even then it may not be possible to avoid the subsequent need for an amendment application. Practitioners should consider whether disclosure material reveals grounds for additional claims or impacts on the case as pleaded. It is imperative to review disclosed documents thoroughly and act promptly in making any necessary applications if new avenues are identified.

18. Practitioners need to be proactive and on the lookout for potential applications to amend, which mostly crop up at case management hearings. It is essential that advocates (for both claimants and respondents) have all the necessary instructions and tools available to them in advance of case management PHs so that they are able to identify and address all relevant claims and issues.

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