EMPLOYMENT TRIBUNALS

Claimant: **Miss NA Markowska**

Respondent: **(1) Sizebreed Construction Ltd**
(2) Mr R Snowdon

Heard at: **London Central** **On:** **27 March 2017**

Before: **Employment Judge Baty**

Representation
Claimant: Mr A Philpott (Counsel)
1st Respondent: Ms T Barsam (Counsel)
2nd Respondent: Mr K Sonaike (Counsel)

JUDGMENT having been sent to the parties on 28 March 2017 (following judgment and reasons having been given orally at the hearing) and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a claim form presented to the Employment Tribunal on 17 October 2016, the Claimant had brought a complaint of sexual harassment against both the First and Second Respondents. Both Respondents, who were represented separately throughout, defended the complaint.

2. At a preliminary hearing on case management held on 15 December 2016 before Employment Judge Grewal, the Claimant's position was that the complaint was brought against the Respondents on the basis of either section 39 or section 41 of the Equality Act 2010 ("the Equality Act"). Employment Judge Grewal set the matter down for a preliminary hearing to determine whether the Tribunal had jurisdiction to determine the claim under either section 39 or 41 of the Equality Act. That hearing was listed for 31 January 2017.

3. That preliminary hearing commenced before Employment Judge Snelson. Mr Philpott, for the Claimant, accepted that the claim could not be brought under section 39 but continued to maintain that the Tribunal had jurisdiction under section 41. However, after lengthy debate, Employment Judge Snelson was persuaded that it was necessary in the interests of justice to relist the preliminary hearing in order to allow time for documents to be sought from third parties (against whom he made three third party disclosure orders). Those documents were intended to cast light on an issue which, in Employment Judge Snelson's view, was likely to be central to the dispute as to whether the Claimant's complaints against both Respondents based on section 41 of the Equality Act were legally possible, namely whether Matthew Bray Decorative Arts & Furniture Limited ("Matthew Bray"), for which the Claimant worked, was, as she was asserting, a sub-contractor of the First Respondent or, as the Respondents maintained, had no contractual relationship with them and contracted directly with the owner of the property at which both Respondents and the Claimant had been working at the time of the alleged harassment, Mr Mansour (or, perhaps, even Mr Mansour's architects). Accordingly, Employment Judge Snelson relisted the preliminary hearing for today, 27 March 2017. Employment Judge Snelson urged the parties to reappraise their positions in light of the documents (if any) which emerged.

4. The third party disclosure orders were duly complied with. The documentation produced, and the evidence of the third parties in any covering replies enclosing that documentation, was unanimously to the effect that there was no contractual relationship between Matthew Bray and either of the Respondents.

5. By letter of 9 March 2017 to the Tribunal, the Claimant, through her representatives, made an application for permission to amend the claim to add a further Respondent, namely Mr Mansour, and to amend and particularise the claims against the First and Second Respondents and against Mr Mansour. Whilst the application made some arguments as to why the proposed amendment should be allowed, it did not set out a draft amended claim.

6. By email of 16 March 2017, the Tribunal informed the parties that the Claimant's application to amend would be considered at the present hearing on 27 March 2017.

Issues for Today's Hearing

7. At the start of this hearing, Mr Philpott, for the Claimant, conceded that the Claimant was not a contract worker in respect of the First Respondent under the provisions of section 41 of the Equality Act and that, therefore, without the proposed amendment, the claim could not continue against the First or Second Respondent. Therefore, the principal issue for which this preliminary hearing had been listed was off the agenda.

8. Mr Philpott maintained, however, that, if his proposed amendment were allowed, he would argue that the First Respondent was an agent of Mr Mansour (whom he said would be a principal) for the purposes of Section 110 of the Equality Act and that, he maintained, the Tribunal would that way

retain jurisdiction to hear the complaints as against both the First and Second Respondents.

9. Even at the start of this hearing, the Claimant did not produce a draft proposed amended claim and Mr Philpott had merely set out the principles in relation to any proposed amended claim in his skeleton argument for the hearing. He sought that the Tribunal should allow the amendment in principle and give him leave to produce a further draft amended claim containing the details in due course. He said that he had a draft in progress but that it was nowhere near a final draft.

10. I observed that it was usual practice to provide the whole of the amendment sought so that the Judge could determine whether the amendment should be allowed with all the information at hand at that point and that, if Mr Philpott's proposed course of action were allowed, there would effectively be two amendment applications, one today on the "amendment in principle" and another at an as yet to be determined future time to consider whether the detail of the amendment should be allowed. I noted that this was unsatisfactory, particularly as the whole of the amendment which was proposed could have provided for this hearing today.

11. In view of that, I sought the views of the Respondents' representatives as to whether such an application should be heard today or, potentially, postponed to such time as a full proposed draft amendment had been provided. Both representatives for the Respondents were of the view that, particularly as one preliminary hearing had already had to be abandoned and they were all prepared for today and, if I did not allow the amendment in principle, that would be the end of the matter, the amendment application in principle should be heard at this hearing.

12. In the light of that, and as all three parties wanted me to hear the amendment application in principle at this stage, I agreed to do so.

13. The Respondent's representatives both, however, made the point that the fact that the amendment application was being presented piecemeal and a complete draft proposed amended claim had not been provided was one factor in relation to the manner of the application which they would be suggesting should be taken into account in deciding whether or not to allow the application to amend.

14. The hearing was, therefore, transformed into a hearing the purpose of which was solely to hear the amendment application in principle on behalf of the Claimant.

15. I also note that there was present at the hearing a Mr S Nicholls of Counsel, who was there representing Mr Mansour. Although he merely observed the rest of the hearing and did not make any submissions, I did allow him to speak at the start of the hearing and, in the light of what was proposed, he made the point that, if the Tribunal was minded to allow an amendment, which would involve adding Mr Mansour as a party, Mr Mansour would be likely to want to make some representations as to whether or not that was something which was appropriate.

The Evidence

16. There was produced to the hearing an agreed bundle numbered pages 1-349.

17. In addition, there was produced a witness statement bundle containing a statement from the Claimant and four statements on behalf of the Respondent. In the light of the change of the issues to be considered at this hearing, the Respondent's representatives explained that it was no longer necessary to call any of their witnesses and they were not called and I did not read their statements.

18. In relation to the Claimant, Mr Philpott said that it was not now necessary for me to read the whole of the Claimant's witness statement and he referred me to specific paragraphs (25-34 and 50) and the documents referred to in them, plus some other documents in the bundle, all of which he asked me to read. The Respondent's representatives, however, said that they would not be cross examining the Claimant. The Claimant was in due course duly sworn in but no cross examination took place.

19. In addition, Mr Philpott produced a skeleton argument and a bundle of authorities and Mr Sonaike produced a skeleton argument.

20. I read in advance the witness statement sections and other documents which I was asked to read and the skeleton arguments. Thereafter, all three advocates made oral submissions.

21. A timetable for cross examination and submissions was agreed between the representatives and me at the start of the hearing and was broadly adhered to.

22. Having heard the submissions, I adjourned to consider my decision and, when the parties returned, gave my decision orally with reasons. Written reasons were not requested at the time. However, the Claimant subsequently in writing requested written reasons, hence these reasons have been produced.

The Law

23. As regards the law in relation to amendments, the leading case is the case of Selkent Bus Co Ltd v Moore [1996] ICR 836. In determining whether to grant an application to amend, an Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regards to the interests of justice and to the relative hardship that would be caused to the parties in granting or refusing the amendments. In Selkent, the then President of the EAT, Mr Justice Mummery, explained that relevant factors would include: the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

Conclusions on the Issues

24. I make the following conclusions, applying the law to the issue to be determined. In doing so, I make any necessary findings of fact as I go along.

25. It should be noted that, in his lengthy oral submissions and indeed in his written submissions, Mr Philpott concentrated primarily on the alleged merits of the Claimant's claim should the amendment was granted rather than the issue of whether I should grant an amendment in the first place. This was to such an extent that, shortly before the close of his oral submissions, I mentioned to him that he had not yet addressed me specifically on the Selkent principles and, as he still had a few more minutes left within his timetabled allocation, invited him to do so. However, it is of course, as a matter of law, those principles which I need to bear in mind in determining whether or not to allow the amendment sought.

26. I turn now to the various factors in relation to Selkent.

Nature of Amendment

27. Whilst in one sense the central allegation of the claim (the alleged act of sexual harassment) would not be changed by the amendment if allowed, the reality is that, in terms of the basis on which this claim is brought, allowing the amendment would significantly change matters. This is not a mere "relabeling". Mr Philpott acknowledged in his submissions that the amendment changed the whole nature of the case. It provides a significant change which will add considerable further factual matters which the Employment Tribunal will need to resolve and further extra legal issues as to whether or not, on the basis of the amended claim, the Tribunal actually has jurisdiction to hear the claim (whether against the First Respondent, the Second Respondent or against Mr Mansour). It will therefore considerably increase the amount of evidence and the amount of submissions required. It will involve a detailed analysis of the relationship between the existing Respondents and Mr Mansour and indeed between Mr Mansour and Matthew Bray and the Claimant (and potentially Mr Mansour's architects). Indeed a further preliminary hearing (to add to the two preliminary hearings in public which have already occurred and the case management preliminary hearing) will almost certainly be required to determine this issue, entailing considerable further Tribunal time and time and cost for the parties. That is the position even on a consideration of the amendment "in principle" alone; it is of course unclear whether or not this burden will be added to even more extensively at whatever point the finalised draft amended claim is produced; that could entail yet another hearing to determine that amendment application too.

28. In addition, as part of the proposed amendment, the Claimant is seeking leave to add a "personal injury" claim. Whilst there is no full detail as to what this will entail, it will almost certainly require new evidence, especially medical evidence, which will also increase requirements in terms of time and cost.

29. These facts point against allowing the amendments.

Time Limits

30. The alleged harassment is said to have taken place on 20 July 2016. The application to amend was made first on 9 March 2017. It was, therefore, made at a time which was considerably outside the Tribunal's time limit of 3 months (even taking into account the stop the clock provisions in relation to ACAS Early Conciliation).

31. As to whether it might be just and equitable to extend time, Mr Philpott has not put forward any good reason for doing so. It might be said that the amendment was applied for only when it became clear that the route against the First and Second Respondents under section 41 Equality Act was clearly blocked and that the Claimant did not know this before the results of the third party disclosure orders came through. However, quite clearly, despite the Respondent setting out from the first that there was no contractual relationship between either of them and Matthew Bray, the Claimant and her representatives proceeded in ignorance and without satisfying themselves of what the factual position was and the fact that there was no route via section 41 to the First and Second Respondents; their original claim form was based on assumption only and they could have, had they wished to, made a similar assumption in relation to Mr Mansour and named him as a party from the start, which (as he was ultimately one of the recipients of a third party disclosure order), may have flushed out the information to satisfy the Claimant and her representatives even sooner. In any case, seeking the amendment only at this stage, when the Claimant is faced with a door shutting on her original means to claim against the First and Second Respondent and she appears simply to be adding Mr Mansour in an attempt to keep the claim afloat, I do not consider that that would be likely to amount to a reason why it would be just and equitable to extend time.

32. This factor therefore also points against allowing an amendment.

Timing and Manner of the Application

33. This is a very late application. No adequate explanation has been given for it being made so late and I have not been referred to any witness evidence as to the reasons for the delay. Whilst it may be understandable in construction contracts that there is a level of complexity, the Claimant was clearly alerted to the position vis-à-vis the contractual relationship or lack of it in the response forms. It should be noted that the Claimant has been professionally advised throughout. At the first preliminary hearing of 15 December 2016, no application to amend was made and what was agreed was a list of issues that identified the claim against the First Respondent as being one based on employment under Section 39. Section 41 was then included. However, there was no argument raised that there was a claim against the First Respondent as agent for anyone else, be it Mr Mansour or any other party. At that point, therefore, the Respondents' position was clear that the First Respondent was not an employer or a principal in relation to the Claimant and that the First Respondent had no contract with Matthew Bray and that Matthew Bray's work at the property was for the benefit of Mr Mansour (and not for the First or Second Respondents).

34. There was therefore a delay in the Claimant's seeking to clarify or take any steps to clarify the position. That is surprising, particularly given that she was represented throughout. The Respondents' position was restated thereafter. Only on 25 January 2017 did the Claimant's solicitors appear to have made an effort to get more information from Matthew Bray, by requesting of Matthew Bray's representatives to see any contract between Matthew Bray and the First Respondent. Up until then, the Claimant had proceeded on the basis of section 39/section 41 without any evidence.

35. The Claimant then received the Respondent's witness statements for the last preliminary hearing setting out that there was no contractual relationship, with, apparently, three of these witnesses setting out as their evidence that there was no such relationship. There was still no application to amend. The Claimant, however, continued to maintain that the First Respondent was liable under section 41, although eventually withdrew the section 39 point on pressing.

36. Only by 31 January 2017, when at the preliminary hearing of that date Employment Judge Snelson made clear the difficulties for the Claimant with the claim on the basis that she had put it, did the Tribunal (rather than the Claimant or her representatives) take action to try and establish the evidence which might (or might not) back up the basis on which the Claimant's claim was brought. The information that the Tribunal's orders elicited from the third parties duly supported what the First and Second Respondents had been saying the entire time.

37. Essentially, therefore, it is not correct, even if the Claimant had asserted it as such, that she had no choice but to wait until the point when she did to make this application to amend; rather, she and her representatives could have taken steps at a much earlier stage to satisfy themselves as to whether the original claim had any basis in the manner in which it was brought and, if they were so minded to do, could have made an amendment application in relation to the basis for the claim at that stage. There is no adequate explanation for the delay.

38. Furthermore, in relation to the proposed personal injury claim, no explanation for the delay in relation to that complaint has been given at all.

39. Finally, in terms of the manner of the application, I reiterate the points that have been made by the Respondents' representatives from the start of this hearing, that the Tribunal has not been provided, either on 9 March 2017 or at this hearing, with a complete draft proposed amendment; rather what there is, is a proposal that the amendment be agreed in principle and that the Claimant should then have further time to complete the full draft proposed amendment. As noted, this effectively means two assessments of the amendment (if the amendment in principle is allowed at this stage) and that that should be required is completely unnecessary. No reason at all has been provided as to why a full draft proposed amendment could not have been provided on 9 March 2017, let alone at this hearing.

40. These reasons, in relation to the timing and manner of the amendment application, also therefore point against allowing the amendment.

Balance of Hardship

41. It is true that, given her belated acceptance that the original basis of her claim cannot succeed, the Claimant will lose the opportunity to have her claim heard if the amendment is not allowed (although it was open to the Claimant, in relation to any personal injury claim which she considers she may have had, to have brought that in a different forum).

42. However, in contrast, the hardship to the Respondents is also very significant indeed. Firstly, the costs of the various hearings up until now have been extensive and unnecessary and, as noted, a further preliminary hearing is going to be likely to be required in order to determine whether or not there is any jurisdictional basis for the Tribunal to hear the Claimant's claim on the proposed amended basis. This is aggravated by the poor amendment application itself (which does not contain the details of the application). It is very significant that Mr Philpott says that there are more changes to come. That suggests that the costs of the amendment and the issues arising out of it may be even more significant than they already appear to be. As noted already, there will be a requirement for considerable extra evidence, submissions and legal argument if the amendment is allowed, all of which will add to the already substantial costs to the Respondents of defending this claim.

43. Therefore, on the balance of hardship, I would on the basis of the above, not allow the amendment.

44. That is enough to dispose of the amendment application in itself.

45. However, I would also add some additional reasons for not allowing the amendment which arise out of a preliminary consideration of the merits of the claim as it is proposed to be made on an amended basis. As noted, Mr Philpott spent most of his submissions talking about the merits of the claim as it is proposed to be amended. However, even on his submissions, it looked like an attempt to shoehorn in a different basis for the claim using Mr Mansour now that it was finally obviously clear to the Claimant's representatives that the basis of the claim through section 41 against the first two Respondents alone would not work. In connection with this, Mr Sonaike identified two problematic points to the proposed amended claim, even if one takes the Claimant's case at its highest.

46. First of all, the mere fact that Mr Mansour, whom it is understood that the Claimant did not even meet and who apparently does not even ever attend the property which he owns (at which the alleged sexual harassment is said to have taken place), received benefit from the work that the Claimant did is not in itself enough to fix him with a relationship of principal to the Claimant for the purposes of section 41. I was referred in this respect by Mr Sonaike firstly to the Northern Ireland Court of Appeal case of Jones v Friends Provident Life Office [2003] NICA 36(1), which was approved by the Court of Appeal in Leeds City Council v Woodhouse [2010] IRLR 625 in which, at paragraph 19, the Court of Appeal stated "the authorities suggest that where the principal and the employer of the applicant are in the relationship of contractor and subcontractor, the mere fact that the applicant does work

under the subcontract from which the principal will derive some benefit is not enough to bring the applicant within [the equivalent of section 41]". In this case, Mr Mansour was not even a main contractor, but simply the end client commissioning Matthew Bray to deliver a project.

47. Secondly, even if Mr Mansour was a principal for the purposes of section 41, the alleged discrimination was allegedly carried out by the Second Respondent (an employee of the First Respondent). Whilst Mr Philpott suggests that the First Respondent was an "agent" of Mr Mansour, there is no suggestion that the Second Respondent was an employee/agent of Mr Mansour, which he would need to be in order to fix Mr Mansour with liability for the Second Respondent's actions and, conversely to fix the Second Respondent with liability as an employee/agent of Mr Mansour.

48. These are both points which bring significant difficulty for the Claimant, even on the proposed amended claim. As such, the fact that the refusal of this amendment will prevent her from bringing the claim (on that basis) is likely to be less of a hardship to her if that claim is effectively one which is highly problematic from the start. Therefore, whilst I have refused the amendment request without reference to these two points on the potential merits of the proposed amended claim, these points add further reasons to why it is appropriate to refuse that application and why, in terms of the balance of hardship, the hardship to the Respondents even more greatly outweighs any hardship to the Claimant.

Dismissal of Claim

49. Therefore, as it was acknowledged at the start of this hearing that, without the amendment being allowed, the claim would not be pursued on its original basis, I dismiss the claim.

Respondents' Cost Applications

50. Both representatives for the Respondents then made applications for costs.

51. At this point, Mr Nicholls left the hearing.

52. The Tribunal's powers to make awards of costs are set out in the Employment Tribunal Rules of Procedure 2013 at Rule 78-84. The test as to whether to award costs comes in two stages:-

    1. Firstly, has a party (or that party's representative) acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted or did the claim or response have no reasonable prospect of success? If that is the case, the Tribunal must consider making a costs order against that party.

    2. Secondly, if that is the case, should the Tribunal exercise its discretion to award costs against that party? In this respect the Tribunal may, but is not obliged to, have regard to that party's ability to pay.

53. I explained the above law summary to the parties at this point, primarily for the benefit of the Claimant.

54. Ms Barsam produced a costs schedule in relation to the costs of the whole claim to date totalling almost £27,000. However, she chose to limit her application to an application for an award of £7,500, primarily in relation to the costs incurred in relation to this hearing.

55. Mr Sonaike did not have a costs schedule on behalf of the Second Respondent, but in any event limited his application to £3,000 in relation to the costs of this hearing, on the basis the real costs in this respect would clearly far exceed this.

56. I heard submissions from all three representatives and I also asked the Claimant some questions about her means. I then adjourned to consider my decision.

57. When I returned, I gave the parties my decision with my reasons. I decided to refuse both applications for costs for the following reasons.

58. The applications were made on various bases, including that the claim had no reasonable prospect of success and unreasonable conduct on the part of the Claimant/her representatives.

59. In relation to prospects, I agreed that, effectively, the claim as originally pleaded (against the First and Second Respondents only on the basis of section 41/section 39) had no reasonable prospect of success in the light of the facts as, in the absence of a contract between the First Respondent and Matthew Bray, the Claimant could not be a contract worker in relation to the First Respondent for the purposes of section 41. However, and this is something I will return to later, the Claimant did not know this at the time she brought the claim and, given the lack of clarity that there can be in the various relationships between entities in relation to construction projects generally, these were not facts in her possession so this was not a case of her knowing the facts from the start which showed that her claim had no reasonable prospect of success. Similarly, I do not consider that, at that stage, it was unreasonable for the Claimant to pursue the claim in the manner that she did and based on the assumption she made at the point when she brought the claim.

60. After the responses came in, they included statements that there was no contract between the First Respondent and Matthew Bray and therefore the Claimant was not a contract worker. That was a question of evidence. The Claimant, through her solicitors, was on notice at that point that they needed to try and enquire to find that evidence. They could have done this sooner; the only time they did so was late on, on 25 January 2017. That was certainly poor, but it does not in my mind cross the boundary of unreasonableness or unreasonable conduct for the purposes of the threshold in relation to costs applications. Similarly, until the facts were established in this respect, it was not unreasonable conduct, in my opinion, not to discontinue the claim after costs letters written by the First Respondent suggesting that the Claimant should do just that.

61. Once the information had been provided, albeit as a result of the intervention of the Tribunal in making the third party disclosure orders, the claim as originally pleaded was, at this hearing, effectively discontinued.

62. The Claimant sought to amend the claim. As I have found, there were considerable potential difficulties with the proposed amended claims and I have turned down that application. However, I do not consider that it was unreasonable conduct to seek to apply to amend.

63. Therefore, as there was no unreasonable conduct, the first stage of the test is not crossed in this respect and I do not need to go on and consider my discretion as to whether to award costs under the second stage of the test.

64. To the extent that the claim in reality had no reasonable prospects from the start in the light of the evidence as to the lack of a contract between the First Respondent and Matthew Bray, that does require me to consider my discretion at the second stage. However, as, for the reasons above, the Claimant did not have the information in her possession to know this until much later, I do not consider it appropriate to make any award of costs for that reason alone. Had the Claimant continued to pursue the claim on the original basis once that evidence was in her possession, that would have been a different matter; however, once she did receive that information, she discontinued the claim on the original basis.

65. The applications are therefore both disposed of for these reasons.

66. I would add, however, that if I did have to consider my discretion further, I would not in any event have made an award of costs, on the basis that the Claimant has no means to pay those costs. Without going through the details, the Claimant provided me with answers to the various detailed questions which I asked her which confirmed this.

Employment Judge Baty
10 April 2017