EMPLOYMENT TRIBUNALS

Claimant: **Ms Galloway-Howes**

Respondent: **Mark Swatts Morse LLP**

Heard at: **North Shields** **On:** **2 July 2018**

Before: Employment Judge Arullendran

Representation
Claimant: Mr R Ryan, Counsel
Respondent: Mr A Tinnion, Counsel

JUDGMENT

The Judgment of the Employment Tribunal is that the Claimant's claim is amended to include the following claims: -

1. Automatic unfair dismissal pursuant to Section 99 of the Employment Rights Act 1998.

2. Pregnancy and maternity discrimination pursuant to Section 18 of the Equality Act 2010.

3. Indirect sex discrimination pursuant to Section 19 of the Equality Act 2010.

REASONS

1. I heard from Counsel for the Claimant and Counsel for the Respondent, there being no attendance by the Claimant, and I was provided with a copy of the Claimant's submission at the beginning of the hearing. The Respondent requested written reasons at end of the hearing.

2. The Claimant presented a claim form to the Employment Tribunal on the 21 March 2018 bringing complaints of unfair dismissal and wrongful dismissal. At a Preliminary Hearing conducted by Employment Judge Pitt on the 16 May 2018, the Claimant made an application to amend

her claim, by way of relabelling, to bring claims under Section 99 of the Employment Rights Act and Section 18 of the Equality Act 2010. The application was resisted by the Respondent on the basis that they had no prior notice of the application to amend and Employment Judge Pitt ordered that the Claimant had to submit a fully pleaded amended claim by 22 May 2018 and the Respondent had until the 29 May to respond to that application. That having been done, the matter now comes before me to determine whether the Employment Tribunal should exercise its discretion to allow the amendments sought by the Claimant under Rules 29 and 30 of the Employment Tribunal Rules.

3. In considering this application, I have applied the Presidential Guidance on general case management, which was reissued on 22 January 2018 and, in particular, guidance number one. I note that a distinction is drawn between amendments which seek to add or substitute a new claim arising out of the same facts as the original claim and amendments that add a new claim entirely unconnected with the original claim. It is common ground that the Claimant originally made a claim about asking to return to work on a part time basis after the birth of her child, which the Respondent refused on the basis that they required employees to be in attendance at the office during specified hours.

4. The Respondent's response to the Claimant's application concedes that the Claimant was dismissed on 25 December 2017 and the Claimant submits that the Section 99 claim was already intrinsically present in the body of the ET1 and, therefore, to allow this claim would amount to merely a relabelling of the original claim. Mr Ryan also submits that the Section 18 Equality Act claim can be discerned from the body of the ET1 but does not seek to argue that this amendment amounts to relabelling, nor does he seek to argue that the Section 19 claim amounts to relabelling.

5. The Claimant submits that the original ET1 was submitted without the benefit of legal advice and assistance and this is the reason why she did not raise the claims set out above, that she instructed Solicitors around mid-April 2018 through her home insurance and the Preliminary Hearing took place on 15 May 2018, where these amendments were raised. The Claimant submits that the refusal of the amendments could deprive her of a suitable remedy and Mr Ryan submits that the amended claims can be heard within the three days set down for the substantive hearing.

6. Mr Tinnion submits on behalf of the Respondent that he is in agreement with the Claimant's submissions regarding the law and raises no objections to the Further and Better Particulars which have been submitted by the Claimant. The Respondent submits that none of the new claims sought by way of amendment by the Claimant should be allowed and refers to a recent decision in the case of Patka v British Broadcasting Corporation UKEAT/0190/17. The Respondent submits that the facts in this case fall to the extreme end of being new claims rather than it being merely a relabelling exercise. The Respondent submits that it will have to adduce new evidence in terms of the

justification defence, i.e. whether it was a proportionate means of achieving a legitimate aim in the Section 19 claim and may lengthen the substantive hearing by one day.

7. I am referred to the leading case of Selkent Bus Company Limited v Moore (1996) ICR 836 in which the then president of the EAT, Mr Justice Mummery, gave some guidance on how the Employment Tribunal should deal with an application for leave to amend. The factors to be considered are: -

    i. The nature of the amendment, ranging from relabelling to the making of entirely new factual allegations which change the basis of the existing claim.
    ii. The applicability of time limits, whether the new claim or cause is out of time and, if so, whether the time limit should be extended.
    iii. The timing and manner of the application, i.e. the application should not be refused solely because there has been a delay in making it, however delay is a discretionary factor and it is relevant to consider why the application was not made earlier.

8. I note that the second factor of time limits only applies where a new claim or cause of action arises and does not apply to those cases where the Tribunal is dealing with claims of relabelling.

9. Applying the law to the facts, I find that the claim of automatic unfair dismissal under Section 99 of the Employment Rights Act is so closely linked to the claim of ordinary unfair dismissal as set out by the Claimant in the body of her ET1 that the requested amendment should be allowed by way of relabelling of the original claim. The ET1 clearly sets out that the Claimant believed her dismissal was connected with her pregnancy and maternity leave. As the amendment is made by way of relabelling, rather than the bringing of a completely new claim, the question of time limits does not arise.

10. The Claimant's maternity leave began on the 01 March 2017 and therefore a protected period, as defined by Section 18(6) of the Equality Act 2010, started on the 01 March 2017 and ended on 28 February 2018. Therefore, the actions that the Claimant is complaining about in the body of her ET1 occurred during the protected period. I find that the details the Claimant relies on in respect of the Section 18 claim are set out in the body of the ET1, albeit in layman's terms, and although Mr Ryan has not sought to argue it, I find that this is a relabelling of the original claim and therefore the time limit aspect does not arise. As the details of the claim are already set out in the body of the ET1, there would be little or no prejudice to the Respondent in meeting this claim, particularly as the documents and evidence relating to the unfair dismissal claim will be entirely relevant to the Section 18 claim, but to deny the amendment would be unjust as it would deprive the Claimant of any redress in respect of this claim. Therefore, I allow this amendment and the Claimant's claim is amended to include the

claim of pregnancy related discrimination pursuant to Section 18 of the Equality Act 2010.

11. In terms of the Section 19 Equality Act claim, I note that this is slightly more involved than the Section 18 claim, however, I find that the facts relied on by the Claimant are the same as those that she relies on in the body of her ET1 for the unfair dismissal claim, i.e. that she requested a working pattern which the Respondent refused to allow because it required the attendance of its staff at specific times of the day. Therefore, I find that this is an amendment where the Claimant is seeking to add a new claim arising out of the same facts as her original claim and, as such, the amendment sought is properly categorised as an exercise in relabelling and the question of time limits does not arise.

12. I have taken on board the Respondent's submission about the extra evidence that it may have to produce in meeting the Section 19 claim, but I find that the prejudice to the Claimant in refusing this amendment is greater than that to the Respondent as the Claimant would be denied a remedy with no other avenue through which to pursue her claim of indirect discrimination, whereas the Respondent is not certain whether extra witnesses would have to be called, or not, and there is no evidence in front of me that suggests that this would lead to the necessity of further documents to be disclosed by the Respondent. I have taken on board what the Respondent has said about this matter not being completed in the three days as currently listed and that it, potentially, may be required to be heard over four days, however that is a matter that can be addressed by the Employment Tribunal by revisiting the Case Management Order in this case and to refuse the amendment sought merely on this basis would cause the Claimant more prejudice than that to the Respondent. The application has been made fairly promptly, given that the Claimant was waiting for her insurance company to appoint a legal representative, who does not have offices in the local area, and the Respondent has not been able to point to any particular prejudice caused to it by the late amendment, over and above the inherent prejudice of being exposed to a claim which could not otherwise have been brought. Therefore, I allow this amendment and the Claimant's claim is amended to include the claim of indirect sex discrimination under Section 19 of the Equality Act 2010.

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Employment Judge Arullendran

_____17 August 2018_____