



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Abercrombie

Respondent: The Equality and Human Rights Commission

Heard at: Manchester

On: 31 May 2019

Before: Employment Judge Grundy

REPRESENTATION:

Claimant: Mr Johnson, Mackenzie Friend

Respondent: Mr Chegwin, Solicitor

JUDGMENT ON APPLICATION TO AMEND

The judgment of the Tribunal is that:

1. The claimant's application to amend the ET1 to add a new claim of automatic unfair dismissal relating to a public interest disclosure is refused.
2. The respondent's application for an Unless Order is granted such that the Tribunal orders the claimant to provide:
 - (1) a full copy of the original notes she made of the meeting she had with Miss Lucas on 7 March 2018;
 - (2) a full copy of the original notes she made of the meeting that she had with Miss Campion on 16 March 2018; and
 - (3) a copy of any other document she has not yet disclosed which is in her possession, custody or control that relates to the issues in this case.

3. If the first two of those orders are not complied with in full within seven days of the Order being issued, the entirety of the claimant's claim shall be struck out without further order.
4. The Case Management Order of Regional Employment Judge Parkin of 19 October 2018 is varied to provide that the date for the respondent to exchange the bundle of documents shall be extended 21 June 2019, and the date for exchange of witness statements shall be extended 28 June 2019.

REASONS

1. The background to this matter is set out in the case management discussion which the Regional Employment Judge conducted in October 2018, and does not need to be repeated. These reasons are given on an extempore basis.
2. The claimant's application for an amendment to the ET1 was made on 21 March 2019 and she submitted the formal request as follows:

"I would like to request authority to include a qualifying protected disclosure under the Public Interest Disclosure Act 1998, namely 43B:

- (a) that a criminal offence has been committed, is being committed or is likely to be committed; and
- (d) that the health or safety of any individual has been, is being or is likely to be endangered."

The claimant said:

"I believe that by raising my concerns regarding disclosure of information which is in the public best interest to my line manager has contributed to my dismissal and I have suffered a detriment as a result of raising these concerns."

The letter also said:

"This claim was not included in the original ET1 due to time constraints, my disability and the deterioration of my health conditions due to the treatment received by the respondent."

3. The Tribunal heard submissions on the amendment application and the Respondent's application. The matters to which the Tribunal has given consideration relate to the nature of the amendment, the applicability of time limits and the timing and manner of the application. The Tribunal has to give credence to the overriding objective and consider the justice of the case. This is a case in which clearly there has been a previous case management hearing and in which a final hearing for three days is listed at the end of July 2019.

4. The nature of the amendment pleads a brand new claim. There is neither a sniff of a public interest disclosure claim nor of any kind of unfair dismissal claim in the claimant's original ET1.

5. Looking at the application so far as stated in writing, the Tribunal had to draw out from the claimant's representative some further matters to put meat on the bones of what it was the claimant was saying in respect of an alleged qualifying disclosure. It turned out that she was alleging, so far as a criminal offence aspect is concerned, that she had been investigating overtime payments claimed by the Finance Director of the respondent and she relied upon an email sent, (to a more junior manager) which was essentially a request for information about overtime payments and hours on 15 February 2018.

6. In respect of the health and safety aspect, the matter was put on a much more general basis as an allegation of excessive workload, particularly at the end of the financial year. It seemed to the Tribunal that the claimant would have an uphill battle in relation to proving a factual matrix for an automatic unfair dismissal claim on this basis, such was the information that was given at this stage.

7. The claimant relies, as a reason for failing to include such a claim in her original ET1, on ill health and impairment. The Tribunal is sympathetic to the issues that the claimant raises in medical evidence about her history and how this has affected her life. She produced today information from her GP surgery and from the Greater Manchester Mental Health Therapy Services about her mental ill health. She has attended appointments in 2018, having reported a history of childhood abuse and abusive relationships in adulthood. She has also lived outside of the UK then returning to the UK.

8. In particular, in the correspondence dated 1 October 2018 from Penny Young, a Cognitive Behavioural Therapist, it says:

“In February 2018 Ailsa was sacked from her job and her mental health deteriorated following this. She experienced problems with low mood, anxiety, panic, poor motivation, lack of energy, sleep and appetite. She is receiving advice from ACAS and has an Employment Tribunal pending.”

The letter goes on:

“She has recently commenced an MA course at Salford University in Psychology of Coercive Control. She is feeling positive about the course and thinks it will help her move forward. She is feeling better and symptoms of depression and anxiety have improved. She reports some ongoing issues with sleep and appetite but they are improving.”

That letter is dated 1 October 2018.

9. It is relevant because of the timeframe over which the Tribunal has to consider whether or not it was reasonable for the claimant to have included the matters she now seeks to add to the ET1. She was dismissed on 17 March 2018 and submitted her claim in time. After the original dismissal there was an appeal through which she was represented by a trade union representative and an employment

lawyer. Throughout that process the claimant at no time raised an automatic unfair dismissal claim. The claimant was then instructing a solicitor at the time that she provided the ET1. That solicitor is an experienced practitioner in the North West in employment law matters. Again it is plain the grounds of complaint did not include any matter pertaining to automatic unfair dismissal by means of a whistleblowing claim. The particulars are lengthy, run from page 95 to page 105, and set out the discrimination claims which the claimant brings related to her disability and relying on her disability, which is the matter which she says has prevented her from bringing the whistleblowing claim before the Tribunal until March 2019.

10. In the Tribunal's view it seems a rather illogical way of looking at the reason that the whistleblowing has not been flagged up earlier, and the Tribunal is little bit cynical about that and the delay that has come to pass. It is an inordinate amount of time since the claimant filed that ET1 to then in March 2019 come before the Tribunal with a brand new claim, after a previous case management hearing.

11. It seems that it was reasonably practicable for the claimant to have brought the claim if the factual matrix, which has been within her knowledge since her dismissal was present. It seems also that the matters, which she relies on, in respect of disability, were the more difficult to deal with and process rather than the enquiry that she claimed she was making in respect of the Finance Director.

12. The Tribunal considered overall the justice of the case. The final hearing is listed in short course towards the end of July 2019. If the Tribunal granted an application, this final hearing would be lost. Listing three day hearings before this Tribunal at the moment means a hearing in 2020. That is not good for either the claimant or the respondent, and it is not in the interests of justice for a delay to take this case into the New Year.

13. The Tribunal also noted the respondent's submissions that the claimant has been involved in higher education since she was dismissed. She has applied for other jobs, hence the query about the logicity of not including this claim in the original ET1.

14. This Tribunal considers that the parties should not lose the final hearing. If the final hearing proceeds and the orders made in respect of the documents are produced then the claimant has the opportunity to litigate the discrimination claims on the grounds of disability, she has the opportunity to litigate those in early course, and the remedies that are available to her are more extensive than those that are available if she succeeded in respect of automatic unfair dismissal. So it seems that all of the factors relating to the interests of justice sound on the respondent's side of this fence such that the Tribunal does not allow a new and weak claim to be added to the ET1.

15. So far as the Unless Order is concerned, previous directions were given and reminders were sent and requests were sent to the claimant regarding these documents. The documents that the respondent seeks are wholly within the claimant's power to produce. They date back to 7 March 2018 and 16 March 2018. It is right that they should be produced in early course so that the bundle can be completed and so that this final hearing runs properly at the end of July 2019. The Tribunal fails actually to understand why those notes have not been produced

currently because they are matters which have been flagged up repeatedly. It is anticipated, therefore, that they will be produced in accordance with this order and that the claim can proceed to be heard at its listed hearing at the end of July 2019.

16. The dates for the filing of the bundle and the witness statements so that a hearing can take place have been amended as above.

17. Those are the orders of the Tribunal and the reasons for them.

Employment Judge Grundy

Date 5 June 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
7 June 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.