Case Number: 2300692/18

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Ms A Siddiq		**Brady Corporation Limited**

PRELIMINARY HEARING

HELD AT **London South** **ON** **23 May 2019**

EMPLOYMENT JUDGE G Phillips

APPEARANCES:

For the Claimant: In person
For the Respondent: Mr M Sellwood, Counsel

JUDGMENT

1. The Claimant's application to amend her complaint to add new complaints of sexual harassment and gender discrimination is refused.

REASONS

Procedural background

1. The Claimant, who at the time of her dismissal was a Senior Account Manager with the Respondent's business printing section, presented an ET1 Claim Form to the tribunal on 23rd February 2018, in respect of her dismissal for misconduct on 20th November 2017. In that claim, the Claimant ticked the boxes for unfair dismissal, race, religion and belief discrimination, and said she was owed money in respect of notice pay, arrears of pay and other payments. By way of further information, she attached to her ET1, a letter dated 1 February 2018, which solicitors she had instructed at that time, had sent to the Respondent. She did not continue to be represented by these solicitors for the purposes of this hearing. The Respondent denies all the claims.

2. At a Case Management Preliminary Hearing on 11 July 2018, Regional Employment Judge Hildebrand listed the case for a 7 day hearing starting on 8th August 2019. It was noted at paragraph A2 of Schedule A that "The Claimant intimated … a desire to amend to expand upon the allegations already made under the jurisdictions identified and also to add claims of discrimination on grounds of sex. It was also noted at B1 of Schedule B "The Claimant wishes to raise further matters in relation to jurisdictions already invoked and add additional jurisdictions to the claim. The Claimant must prepare a proposed draft amended particular of claim and apply for leave to amend in the normal way. It has been made clear to the Claimant that no time is prescribed for the Claimant to apply. To grant such time would suggest that the Claimant is not under an urgent obligation to produce the proposed amendment as soon as possible."

3. On 1 August 2018, some three weeks after the case management hearing, the Claimant provided a document entitled "Claimant's Amended Particulars of Claim". She also provided a Schedule of Loss. In her covering email, she submitted that she did not "initially appreciate and now realise how complex and serious the pleadings needed to be. I could not afford to be represented by a solicitor and still cannot afford to instruct a solicitor to act for me in respect of all of the proceedings. However, I have now realised that I need to more fully particularise my claim and so have instructed a solicitor to help me deal with this limited aspect of the paperwork of the claim. Setting out my claim more clearly and in more detail would be in accordance with the Overriding Objective as it will assist both parties to understand and assess the claim and so work towards early settlement while also ensuring that all of the aspects of my claim are before the Tribunal and so can be dealt with fairly and justly. I therefore ask that the Tribunal grant permission for me to file the attached amended ET1 and schedule of loss in respect of my claim. No prejudice will be caused to the Respondent by allowing this amendment as they will be more easily able to assess my claim". Subsequently, on 22 August 2018 and 22 May 2019, the Claimant sent further emails along similar lines explaining her reasons for seeking her amendment.

4. It is this application for permission to amend to include additional claims of discrimination on grounds of sex and sexual harassment that is now before me for determination.

Evidence and submissions

5. I had before me, the original ET1 and ET3, the Case Management Order of 11 July 2018, the amended Particulars of Claim, the emails referred to above and a written Skeleton Argument prepared by Mr Sellwood. The Claimant made brief oral submissions along the lines of the emails referred to above. She said that after she left the Respondent's employment, she had time to reflect on other matters including the general culture of the work place. She said she realised she had experienced other types of offensive behaviour beyond what she had set

out in her ET1, which had become the norm. She said that the #metoo campaign had also highlighted this to her. She referred to one particular incident said to have occurred in or around 2012/2013. She said another individual had brought a complaint about this at the time and it had been settled. She also mentioned evidence that she had in support of this.

6. Mr Sellwood referred to his written Skeleton and briefly expanded upon it. He said that a lot of what was in the Claimant's Amended Particulars were helpful and it was only paragraphs 6, 7 (which sought to introduce an allegation of sexual harassment in regard to the incident said to have occurred in or around 2012/2013.and the words ""or as a result of her gender" in Paragraph 8 (which seeks to expand the Claimant's direct discrimination claim to include the ground of gender as well as introducing several new comparators whose circumstances relate to alleged disciplinary offences in 2006 and 2102) that were objected to.

7. Mr Sellwood submitted that I should not permit this application. These were two new claims, which constituted a substantial alteration to the pleaded claim, were submitted three weeks after the 11 July hearing, which was itself the first time they had been mentioned; the main allegation was a new and historic claim (which was out of time by at least four years) which would require further disclosure (which had already taken place) and witness evidence, and could jeopardise the listed trial date. It would not be just and equitable to grant such an extension. Further, he said the claims lacked merit.

8. Mr Selloood referred to the following cases: (1) the EAT's decision in *Selkent Bus Co Ltd v Moore* [1996] IRLR. 661, where the EAT set out some principles to be considered when an application to amend is made, namely that whenever the discretion to grant an amendment was invoked, "a tribunal should take into account all the circumstances, [including but not limited to the nature of the amendment, the applicability of time limits and the timing and manner of the application]", before balancing "the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it"; (2) the decision of HHJ Hand QC in *Galilee v Commissioner of Police for the Metropolis* [2017] (UKEAT/0207/16) – that the doctrine of "relation back" does not apply with an employment tribunal; and (3) the case of *Herry v Dudley Metropolitan Borough Council* [2018] (UKEAT/0170/17), particularly paragraphs 80 and 81, that when taking into account the balance of hardship between the parties a Tribunal is justified in taking into account (as best it can) an obviously hopeless claim "Nothing is lost by being unable to pursue a claim which cannot succeed".

9. This document reflects and expands upon the brief ex tempore oral decision given at the hearing. In so far as there is any inconsistency between this and what was said at the hearing, this document should be taken to represent the correct version of events.

Conclusion

10. The Tribunal has power to grant leave to parties to amend under its general case management power in Rule 29 of the Employment Tribunal Rules of Procedure 2013. Under s 123(1) Equality Act 2010, any complaints of discrimination must be brought within three months, starting with the date the act or actions complained of took place, or such other period as the tribunal considers just and equitable.

11. Some general principles as to how an employment tribunal should approach an application to amend and guidelines for exercising that power are set out in the decision of the EAT in *Selkent* as referred to above. This approach was approved by the Court of Appeal in *Ali v Office of National Statistics*, [2005] IRLR 201.

12. The EAT in *Selkent*, said it was impossible and undesirable to attempt to list every relevant circumstances exhaustively but that the following circumstances are certainly relevant:
    a. *the nature of the amendment*: applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. A tribunal has to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new course of action.
    b. *the applicability of time limits*: if a new complaint and cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether the complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.
    c. *the timing and manner of the application*: an application should not be refused solely because there has been a delay in making it. There are no time limits lay down in the rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Questions of delay, as a result of adjournment, and additional costs, particularly if they are unlikely to be recovered by the successful party, are also relevant in reaching a decision, but delay in itself should not be the sole reason for refusing an application. A tribunal should nevertheless consider why an application was not made earlier and why it is being made when it is, for example whether it was because of the discovery of new facts or information appearing from documents disclosed on discovery.

13. It was emphasised by the EAT in *Selkent* that whenever taking any factors into account, "the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment" and that "the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it".

14. A distinction can be drawn between amendments which add or substitute a new claim arising out of the same facts as the original claim and those which add a new claim which is unconnected with the original claim and therefore would extend the issues and the evidence.

15. It is clear to me that what the Claimant wishes to add here amounts to substantial additional new claims. It look the Claimant three weeks after the CMD to submit the draft pleading. It is no fault of the Claimant that it has taken 9 months for her application to be heard, but nonetheless it is a fact that the substantive hearing of the initial claims is listed for a 7 day hearing in August and that discovery with regard to that has been completed.

16. Further, the Claimant relies in her sexual harassment claim, on a single incident which is said to have taken place in 2012/13, when a complaint was made by the Claimant "but nothing was done". On any basis, this incident is historic, will require additional disclosure and witnesses and is moreover at least four years out of time. The Claimant says this incident reflects an ongoing culture but she references no other identified incident. In my judgment, if this claim were to be advanced, it would cause additional time and resources to be expended by the Respondent. It might lead to delaying the listed hearing or a risk that it was not completed in time and had to go part-heard. It would not in my judgment be just and equitable to extend time to permit this claim in these circumstances.

17. The second amendment in paragraph 8 has no evidential foundation and is not particularised. There is nothing stated to suggest that any of the events said to have occurred in 2017 were connected to the Claimant's gender. I was of the view that the Claimant would have little or no prospect of succeeding in this claim if it were to be allowed to proceed. If such a claim had been made in the ET1, it was highly likely in my opinion that it would have been struck out as having no reasonable prospect of success or that, at the least, a deposit would have been ordered to be paid before allowing such a claim to proceed. To allow the Claimant to add at this stage a claim that in my view has no or little chance of succeeding, would not only cause injustice to the Respondent, but would also, I believe, given false hope to the Claimant.

18. Taking account of all these various circumstances along with the initial delay and bearing in mind that whenever taking any factors into account, "the paramount considerations are the relative injustice and hardship

involved in refusing or granting an amendment" and that "the Tribunal should take into and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it" and bearing in mind it is not the business of the tribunal to punish parties for their errors, overall I was not willing to exercise my discretion to allow this amendment to proceed..

19. Having regard to the fact that the initial claims are listed for a hearing in August, further directions were given, with the agreement of the parties, for the management of the case to that full hearing.

Employment Judge Phillips
23 May 2019,