EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs Marta Sommerville	AND	Shaw Trust Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY PHONE AT Plymouth **ON** 9 August 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: Mrs M Pointon, Solicitor

JUDGMENT ON APPLICATION TO AMEND

The claimant's application to amend her originating application is refused.

REASONS

1. In this case the claimant seeks leave to amend the claim which is currently before the Tribunal, and the respondent opposes that application. I have heard from the claimant, and I have also heard from Mr Difelice the respondent's solicitor on behalf of the respondent.
2. The claim as it currently stands:
3. The general background and procedural history of the claim as it stands before the determination of this application is as follows.
4. The respondent is a charity which supports young people, and the claimant worked as its Change Office Manager in Bristol from 31 January 2011 until 31 December 2018 when her employment was terminated by reason of redundancy. In its response to this claim the respondent asserts that there was an integration of new businesses, and a consequent restructure, and the respondent advertised a new role of Head of Change Office to deal with the larger restructured business. This role was advertised in August 2018. The claimant applied for that new role but was unsuccessful. Following a subsequent redundancy consultation process the claimant was informed by letter dated 4 December 2018 that her employment

would terminate by reason of redundancy on 31 December 2018. The claimant appealed against that decision but her appeal was rejected on 21 December 2018. There was then some confusion as to the correct amount of statutory redundancy entitlement which was paid to the claimant.

5. The claimant issued these proceedings on 28 April 2019. In part 8 of her originating application she ticked the boxes making it clear that she was claiming unfair dismissal and in respect of her entitlement to a statutory redundancy payment. The claimant did not tick any of the boxes relating to discrimination or the relevant protected characteristics. In the box headed "Another type of claim" the claimant wrote this: "1 - Injury to health, well-being and feelings of the claimant caused by upset and distress by the respondent; 2 - not genuine redundancy, discrimination, and conflict-of-interest."
6. Section 9 of the originating application invites claimants to explain what compensation they are seeking and the reasons for this. The claimant explained the compensation she was seeking and explained in more detail the nature of her claim, and why she disapproved of the respondent's redundancy procedure, and complained of the stress which it had caused her. She effectively set out the reasons for her claim in this box. There was no mention of any discrimination claim, nor any protected characteristic upon which any discrimination claim might be founded.
7. By emails to the Tribunal dated 17 July, 24 July and 2 August 2019 the claimant explained that she wished to clarify her claim. She ultimately confirmed that her claims were these: (1) unfair dismissal, (2) for a statutory redundancy payment, and (3) in respect of two other aspects, as follows: "3.1 Injury to health, well-being and feelings caused by upset and distress … Despite providing details of protected characteristic [presumably meaning despite not providing details of any protected characteristic], and 3.2 "Not genuine redundancy, discrimination and conflict of interest". She added: "I am unable to straightforwardly connect this to the protected characteristics under EA 2010 … I am referring here to mixtures of unfair processes, unfair treatment, not genuine process, not genuine intentions, conflict-of-interest, preferential treatment, nepotism, false reassurance, and others."
8. The respondent asserts that there is no current claim for discrimination, and opposes any application to amend these proceedings to include a claim of discrimination. The matter is listed for final hearing on 18 and 19 September 2019 (approximately six weeks away). The parties have agreed a relevant bundle of documents and have prepared draft witness statements, but not yet exchanged signed versions.
9. The applicable law:
10. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of Chapman v Simon [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.
11. In Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA.

12. In Transport and General Workers' Union v Safeway Stores Limited EAT 0092/07 Underhill P as he then was overturned a Tribunal's refusal to allow an amendment because there was no attempt to apply the Cocking test, and, specifically, no review of all the circumstances including the relative balance of injustice.
13. The EAT held in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors would include:
14. 1 - The nature of the proposed amendment - applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition 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. The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and
15. 2 - The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended [the word "essential" is considered further below]; and
16. 3 - The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. 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.
17. These factors are not exhaustive and there may be additional factors to consider, (for example, 4 - The merits of the claim). The more detailed position with regard to each of these elements is as follows, dealing with each of them in turn:
18. 1 - The nature of the proposed amendment: A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim (often called "relabelling"); and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.
19. Mummery J in Selkent suggests that this aspect should be considered first (before any time limitation issues are brought into the equation) because it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from "relabelling" the existing claim. If it is a purely relabelling exercise than it does not matter whether the amendment is brought within the timeframe for that particular claim or not – see Foxtons Ltd v Ruwiel UKEAT/0056/08. Nevertheless whatever type of amendment is proposed the core test is the same: namely reviewing all the circumstances including the relative balance of injustice in deciding whether or not to allow the amendment (that is the Cocking test as restated in Selkent).
20. The fact that there is a new cause of action does not of itself weigh heavily against amendment. The Court of Appeal stressed in Abercrombie and ors v Aga Rangemaster Ltd 2013 IRLR 953 CA that Tribunals should, when considering applications to amend that arguably raise new causes of action, focus "not on

questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted".

21. Any mislabelling of the relief sought is not usually fatal to a claim. Where the effect of the proposed amendment is simply to put a different legal label on facts that are already pleaded, permission will normally be granted.
22. 2 - The applicability of time limits: This factor only applies where the proposed amendment raises what effectively is a brand new cause of action (whether or not it arises out of the same facts as the original claim). Where the amendment is simply changing the basis of, or "relabelling", the existing claim, it raises no question of time limitation – (see for example Foxtons Ltd v Ruwiel UKEAT/0056/08 per Elias P at para 13).
23. On the applicability of time limits and the "doctrine of relation back", the doctrine of relation back does not apply to Employment Tribunal proceedings, see Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN. The guidance given by Mummery J in Selkent and his use of the word "essential" should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered. The judgments in both Transport and General Workers' Union v Safeway Stores Limited UKEAT 009207 and Abercrombie v AGA Rangemaster Limited [2014] ICR 209 CA emphasised that the discretion to permit amendment was not constrained necessarily by limitation.
24. See also Reuters Ltd v Cole UKEAT/0258/17/BA at para 31 per HHJ Soole: "In this respect a potential issue arises from the conflict in EAT authorities as to whether the Tribunal must definitively determine the time point when deciding on the application to amend (Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge and Others UKEATS/0007/16 (12 August 2016)) or whether the applicant need only demonstrate a prima facie case that the primary time limit (alternatively the just and equitable ground) is satisfied (Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN (22 November 2017)). In the light of the exhaustive analysis of the authorities undertaken by His Honour Judge Hand QC in Galilee, I would follow the latter approach."
25. 3 - The timing and manner of the application: This effectively concerns the extent to which the applicant has delayed making the application to amend. Delay may count against the applicant because the Overriding Objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment - see Martin v Microgen Wealth Management Systems Ltd EAT 0505/06. However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings. This is confirmed in the Presidential Guidance on General Case Management for England and Wales (13 March 2014).
26. The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in Ladbrokes Racing Ltd v Traynor EATS 0067/06: the Tribunal will need to consider: (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) whether, if the amendment is allowed, delay will ensue and whether there are likely to be

additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

27. 4 - The Merits of the Claim: It may be appropriate to consider whether the claim, as amended, has reasonable prospects of success. In Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06, one of the reasons the EAT gave for upholding the Tribunal's decision to refuse the application to amend was that it would have required further factual matters to be investigated "if this new and implausible case was to get off the ground". However, Tribunals should proceed with caution because it may not be clear from the pleadings what the merits of the new claim are: the EAT observed in Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12 that there is no point in allowing an amendment to add an utterly hopeless case, but otherwise it should be assumed that the case is arguable.
28. In Reuters Ltd v Cole UKEAT/0258/17/BA, the claimant had a chronic depressive illness. He presented a claim to the Tribunal for discrimination arising from disability, and a failure to make reasonable adjustments. The claim was stayed pending the outcome of a grievance procedure. The claimant subsequently made an application to amend his claim to include an allegation of direct disability discrimination. The EAT rejected his application. In its view the more onerous test for direct discrimination and the wider factual enquiry needed for such a claim took the application outside the scope of a mere relabelling exercise. A direct discrimination claim imposes stringent tests of knowledge and causation, and requires the employee to show that he has been treated less favourably than a comparator. Granting the amendment would require the tribunal to undertake a wider factual enquiry, and in particular a comparative exercise to determine whether the claimant had been treated less favourably and if so whether this was on the ground of disability.
29. Langstaff P made the following observations in Chandhok v Tirkey [2015] IRLR 195 EAT from paragraph 16: "The claim, as set out in the ET1, is not something to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning … the claim as set out in the ET1. [17] … If a claim or a case is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendment; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in light of the identification resolving, the central issues in dispute. [18] In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which

are proportionate; so that the time needed for a case, and the expenditure which goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverting into thinking that the essential case is to be found elsewhere than in the pleadings."

30. Judgment:
31. Applying these legal principles above to the current application, I find as follows.
32. It seems clear to me from the claimant's originating application that she felt aggrieved at the respondent's procedure during which she failed to secure the new Head of Change Office appointment, and was then made redundant when the junior jobs in the office were reorganised. Her complaint relates to the need or otherwise to make redundancies, the procedure adopted with regard to those redundancies, and her subsequent selection. She disputes that there was a genuine redundancy situation, and was clearly upset and distressed at the events as they turned out. Although she mentioned in her originating application the words "not genuine redundancy, discrimination and conflict of interest", there has never been any explanation as to why she asserts that there was any unlawful discrimination, and the claimant did not tick the box indicating that she wished to pursue a discrimination claim, and did not tick any of the boxes pointing out the relevant protected characteristics. In her application under consideration she openly admits "I am unable to straightforwardly connect this to the protected characteristics under EA 2010". When asked today to elaborate, the claimant was unable to confirm which protected characteristic she intended to rely on, and was unable to set out any prima facie case to indicate why she now says that she might have been treated less favourably on the grounds of any protected characteristic.
33. For these reasons in my judgment the proposed amendment is not one which adds or substitutes a new cause of action which is linked to, or arises out of the same facts as, the original claim (often called "relabelling"). In my judgment it is an amendment which seeks to add a wholly new claim or cause of action which is not connected to the original claim at all.
34. In that event this new cause of action is out of time, and no information has been adduced by the claimant as to why it would be just and equitable to allow any extension of time.
35. There has been some delay in making this application, and the parties are effectively all but ready for the listed hearing on 18 and 19 September 2019. To allow the application would involve substantially different areas of enquiry, and in all probability the hearing would have to be postponed and delayed for several months.
36. In addition, the claim appears on the face of it to be implausible and the claimant has been unable to indicate why there is any prima facie case of discrimination on the ground of any protected characteristic.
37. In conclusion, to deny the claimant's application means that she is unable to argue that the decision to dismiss her by reason of redundancy was in some way unlawful discrimination, in circumstances where she has been unable to identify the protected characteristic relied upon, and has no prima facie case to allege discrimination, and the claim seems implausible. Nonetheless she would remain able to pursue her current claims which seek to challenge the respondent's decisions with regard to the need for a genuine redundancy process, the procedure adopted, and the claimant's selection.

38. On the other hand, to allow the application would involve a new cause of action, and substantial enquiry on the part of the respondent to investigate and answer the new allegations, and given the parties' readiness for trial of the claim as it stands, it would jeopardise the hearing date and be highly likely to result in a postponement. This will cause further delay and inconvenience to the Tribunal and other Tribunal users, as well as the parties in this case. Further delay is not in the interests of justice nor in accordance with the Overriding Objective.
39. For all of these above reasons and bearing in mind the relative balance of injustice to both parties, I therefore refuse the claimant's application to amend her proceedings. In addition, it follows that by refusing the application to include a claim for discrimination, the application to include a claim for injury to feelings and distress must also fail, because this head of claim is not available for the claimant's existing claim of unfair dismissal.

_____
Employment Judge N J Roper
Dated 9 August 2019