EMPLOYMENT TRIBUNALS

Claimant: Mrs L Hudson

Respondent: Green Willow Funerals Limited

Heard at: Cardiff **On:** 20 November 2019

Before: Employment Judge S Jenkins

Representation
Claimant: Miss S Clarke (Counsel)
Respondent: Mr R Goodwin (Counsel)

JUDGMENT

1. The Claimant's application to amend her claim, in the form of the email from her representative dated 5 July 2019 and the attachment to that email, is refused.

2. The Claimant's application to amend her claim, in the form set out in the email from her representative dated 26 August 2019 and the attachment to that email, is granted.

REASONS

Background

1. The hearing was to deal with two applications by the Claimant to amend her claim. The first was set out in an email from the Claimant's representative dated 5 July 2019, and the Scott Schedule which accompanied that email. The second was set out in an email from the Claimant's representative dated 26 August 2019 and the amended Scott Schedule which accompanied that email.

2. In fact, the applications to amend were secondary, as the Claimant's primary contention was that the Scott Schedule merely amplified her claims which had been included in the original ET1 claim form, the boxes for age and disability discrimination having been ticked on that form at the time. The Claimant's representative contended that she had been representing herself at that time, and the claim, understandably, did not contain the complete factual background, which had simply been amplified in the Scott Schedule. I was

therefore urged to simply accept the final Scott Schedule as further particularisation of claims already made.

3. The secondary aspect of the hearing was that if I did not consider that the claims set out in the relevant emails and the Scott Schedule were already contained in the claim form, then there was an application to amend the claim form to include them, applying the "just and equitable" extension to allow any amendment that might be considered to be out of time. I therefore considered the matters on those alternative bases.

4. The Respondent's representative contended that some of the issues set out in the Claimant's Scott Schedule, notably those relating to victimisation and reasonable adjustments claims, were not present in the original claim form and could not be gleaned from its contents. Any claim in respect of those matters was therefore new, was therefore made out of time, and the Respondent contended that it was not just and equitable to extend time.

Issues and Law

5. The parties' representatives both made submissions to me in relation to the tests to be applied in relation to consideration of applications to amend, making reference to the directions provided by the case of Selkent Bus Company Ltd v Moore [1996] ICR 836. I was also myself mindful of the direction provided by the sections of the Presidential Guidance on Case Management dealing with applications to amend.

6. In Selkent, the Employment Appeal Tribunal set out a non-exhaustive list of relevant factors which are to be taken into account in considering a balancing exercise of all the relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by the granting or refusing of the amendment. These were; the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

7. The Presidential Guidance reaffirms the Selkent guidance, noting that relevant factors include the three matters outlined in Selkent, and also noting that tribunals draw a distinction between amendments which seek to add or substitute a new claim arising out of the same facts as the original claim, and those which add a new claim entirely unconnected with the original claim.

9. With regard to time limits, the Presidential Guidance notes that the fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment, and also that it will not always be just to allow an amendment even where no new facts are pleaded. In particular, the Guidance notes that where there is no link between the facts described in the claim form and the proposed amendment, the tribunal must consider whether the new claim is in time and will take into account the tests for extending time limits. In this case, that was the "just and equitable" formula set out at section 123 of the Equality Act 2010 ("EqA").

Conclusions

10. With regard to the question of whether the claims referred to in the emails and Scott Schedule were already in the claim form, I first considered the initial application set out in the email and Scott schedule of 5 July 2019. That had

been submitted in response to an Order of the Employment Tribunal on 21 June 2019 that the Claimant was to "*provide additional information relating to her claims as set out in the ET1*".

11. The email sought to clarify that the Claimant was bringing her claims of age and disability discrimination under the following headings: failure to make reasonable adjustments under sections 20 and 21 EqA; harassment under Section 26 EqA, presumably on the basis of both age and disability; victimisation under section 27 EqA; direct discrimination under section 13 EqA, again, presumably on the basis of both age and disability; and discrimination arising from disability under section 15 EqA.

12. The original ET1 in relation to the detail included at Box 8.2, had noted various points which appeared to underpin the Claimant's claims. The first was that, "*After [the first couple of months] problems began to emerge*". The second was, "*I was excluded from the office team. I was ostracised during conversations. I was not given information needed to do my job and then criticised afterwards, I was given wrong information*". The third was, "*I was eventually dismissed without good reason*". The fourth was, "*I believe I was discriminated against because of my age [and] my disabilities … and that was the reason for my dismissal*".

13. From those, I could discern that the ET1 contained a potential claim for harassment, by reference to the Claimant allegedly being ostracised. I could also discern claims for direct discrimination and discrimination arising from disability, in the context of the references to dismissal. I could not, however, discern any reference within the Claim Form to a claim of victimisation or to a claim relating to a failure to make reasonable adjustments. I did not therefore conclude that those claims were in the claim form at the time and therefore on the face of it, they were out of time, as they were raised for the first time in July 2019, when the ET1 had been issued in January 2019 and the Claimant's employment had in fact ended in September 2018.

14. I considered the direction provided by Selkent and the Presidential Guidance on amendments, and I considered that the applications to amend to include claims of victimisation and failure to make reasonable adjustments were substantial ones. I also noted that these additional claims were substantially outside the time limit, having been raised some six months after the ET1 had been submitted, which had itself submitted very close to the expiry of the primary time-limit extended by the time spent on ACAS early conciliation.

15. With regard to time limits, I had regard to the direction provided by the case of British Coal Corporation v Keeble [1997] IRLR 336, which confirmed that it would be appropriate to consider the terms of section 33 of the Limitation Act 1980, which applies in relation to applications to extend time in civil cases.

16. That section requires consideration of the prejudice which each party would suffer as a result of the decision reached, and regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of

taking action.

17. Considering those elements, I was not satisfied that it would be appropriate to extend time to allow the claim to proceed. None were sufficient in my view, to lead me to conclude it was just and equitable to extend time, and therefore my conclusion in relation to the first application to amend was that, whilst I could accept that the email and the Scott Schedule provided appropriate clarification of the claims under sections 13, 15 and 26 EqA, I did not accept that they should be allowed to amend the claim to include claims in section 20 or section 27 EqA.

18. With regard to the Claimant's second application, that set out in the email of 26 August 2019 and the attached amended Scott Schedule, I noted that these contained new allegations arising from disclosure received by the Claimant or her representative on 19 July 2019.

19. The background to that was that the Claimant had made a data subject access request ("SAR") on 21 September 2018. The Respondent provided a response to that on 22 February 2019, and that response did not include some emails in circulation prior to the Claimant's dismissal or minutes of meetings with several employees, which took place in November 2018 as part of an investigation into a grievance raised by the Claimant following her dismissal. A letter had also been sent by the Respondent to the Claimant on 15 March 2019, in which the Respondent stated that it had no minutes of meetings containing the Claimant's personal data other than those already provided. The disclosure material did however contain those emails and minutes.

20. The Claimant contended that the failure to provide the documents as part of the SAR was a further act of victimisation, arising from what were contended to be previously pleaded protected acts, in the form of verbal grievances raised in April 2018 and September 2018, and a further protected act in the form of the Claimant's grievance letter dated 21 September 2018. Her contention was that she was not aware until disclosure of the nature of the specific concerns over her performance which had led the Respondent to dismiss her.

21. The Claimant contended that those concerns formed part of an explanation of her dismissal and demonstrated that there had been a failure to make reasonable adjustments in the application of the Respondent's procedures at the time, in the form of failing to discount issues which may have arisen from her disability when assessing her performance. My attention was drawn to several examples within those disclosed documents of comments which were contended to refer to performance issues which had arisen from the Claimant's hearing disability.

22. It was further contended on behalf of the Claimant that these matters only came to her attention following disclosure on 19 July 2019, that the Claimant's representative had been away on holiday in the latter part of July, and that it had then taken a little time to discuss matters and then to submit the application to amend, which occurred on 26 August 2019.

23. In this regard, the particular allegations were not referred to within the ET1 and therefore were, on their face, out of time. I therefore needed to consider whether it was just and equitable to extend time. In that regard, I again applied the guidance set out in the Selkent case and the Presidential Guidance. I

noted in particular the content of paragraph 24 of the Judgement in Selkent, which noted that one of the factors to be taken account into account was the timing and manner of the application, where it was noted that it was relevant to consider why the application was not made earlier, and why it was now being made. An example was cited of the discovery of new facts or new information appearing from documents disclosed on discovery.

24. This case directly involved assertions arising from disclosed documents and, in the circumstances, I considered that it would be appropriate to exercise my discretion to extend time on a just and equitable basis. I therefore granted the application to amend the Claimant's claim to include a victimisation claim in the form of the alleged failure to provide the documents subsequently disclosed as part of the SAR process, which is claimed to be a detriment following a protected act. In that regard, that is only in respect of the third alleged protected act, i.e. the grievance letter sent in September 2018, and not the first two alleged protected acts.

25. On the same basis, I also considered it appropriate to grant the application to amend to add in a reasonable adjustments claim drawn from the issues set out in the documents disclosed in July 2019. In my view, taking them at their highest, the extracts from those documents, to which my attention was drawn, are capable of giving rise to a possible claim. I noted however, that the only examples drawn to my attention from the documents related to the Claimant's hearing disability, whereas the amended Scott Schedule also refers to other aspects of what are claimed to be other disabilities. I did not allow the amendments of the Scott Schedule in relation to those aspects as nothing in relation to them was drawn to my attention. I only therefore allowed an allegation, that there was a failure to make reasonable adjustments in the form of setting aside performance concerns arising from the Claimant's hearing disability when taking into the decision to dismiss, to proceed as an amendment.

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Employment Judge S Jenkins

Date: 21 November 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON 25 November 2019

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FOR THE TRIBUNAL OFFICE