EMPLOYMENT TRIBUNALS

Claimant
Respondent

Sabrina Stubbs v Outward Housing

Heard at: Watford **On**: 18 October 2019

Before: Employment Judge Loy

Appearances

For the Claimant: In person
For the Respondent: Mr C Kelly of counsel

JUDGMENT ON A PRELIMINARY HEARING

1. The claimant's application to amend her claim to include claims for whistleblowing detriments and automatic unfair dismissal is granted.

2. The claimant's application to amend her claim to include claims for disability discrimination is granted.

3. The claimant is a disabled person within the meaning of section 6 of the Equality Act 2010.

REASONS

Introduction

1. This hearing considered the claimant's application to amend her claim to include

   1.1 claims arising from alleged protected disclosures made by the claimant during her employment;

   1.2 claims for disability discrimination.

2 If the tribunal exercised its discretion to accept the claimant's amendment to bring claims of disability discrimination the tribunal was asked by the respondent to determine whether or not the claimant was a disabled person

as defined in section 6 of the Equality Act 2010 ("the EqA") at the time she says she was discriminated against.

Fact-finding

The scope and nature of the application

3 The tribunal had the benefit of a witness statement from the claimant in support of her application to amend. That statement was required by a direction from the tribunal. The claimant made verbal submissions in support of her application.

4 It should be acknowledged from the beginning the claimant's first position has consistently been that there is no need for her to make an application to amend. She says that her claim form contained sufficient information to show that she intended to bring claims based both on whistleblowing (i.e. protected disclosures) and on disability discrimination in addition to the claims for constructive unfair dismissal and breach of contract.

5 The respondent's position is that an application to amend is required because the claim form did not contain either a claim based on whistleblowing or on disability discrimination. The respondent also disputes that the claimant was a disabled person as defined in section 6 of the EqA. If the claimant was not a disabled person at the time of any alleged discrimination the tribunal would not be able to consider a claim based on disability even if the amendment on the disability issue was to be allowed.

6 The claimant was cross-examined by Mr Kelly both on her statement and more generally on the merit of her application and her disability status. The tribunal also had sight of a bundle of documents of 177 pages prepared for this preliminary hearing. Included in the bundle were the written submissions of Mr Kelly resisting the amendment application. Mr Kelly expanded verbally on his written submissions at the hearing.

The claim form

7 The claimant presented a claim form to the tribunal on 29 October 2018. It was accepted by the respondent that the claim form explicitly contained two claims. First, a claim for unfair constructive dismissal. Secondly, a claim for breach of contract. The claim for constructive dismissal is made on a "last straw" basis indicating that the claimant would be relying on a number of matters that culminated in her resignation. The breach of contract is a claim that the respondent did not allow the claimant to obtain a National Vocational Qualification.

8 The claim form is relatively brief. The claimant did not tick the box at 8.2 of the claim form which would have indicated an explicit intention to pursue a claim for disability discrimination. The claimant did indicate at 8.2 that she was intending to make "another type of claim which the Employment tribunal can deal with" by ticking the appropriate box. The nature of that claim is then described as "work related stress".

9 In response to the requirement on the claim form to set out the background and details of the claim, the claimant says that her dismissal "was in a very calculated manner whilst [she was] on sick leave". She says that her work-related stress came about because the respondent had not safeguarded service users. She goes on to say that a big part of the reason for her claim is that the claimant wants the respondent to be investigated so that "vulnerable service users can be protected from harm".

10 The clamant ticked the final box under 9.1 of the claim form. That box applies to claimants who are bringing a claim of discrimination. The specific effect of this box is to let the tribunal know whether a claimant is asking the tribunal to make a recommendation should a finding of discrimination be well-founded. In simple terms, the tribunal has power to make a recommendation that the respondent takes certain steps to address any adverse effects of a finding of discrimination. The relevance here is that the power to make a recommendation only applies if the claimant is bringing a claim of unlawful, discrimination in the first place.

11 The claimant ticked box 10.1 of the claim form. That box applies to claimants who are making a protected disclosure under the Employment Rights Act 1996 ("ERA"). As the text at box 10.1 says, a protected disclosure is "otherwise known as a whistleblowing claim". The specific effect of ticking box 10.1 is to authorise a copy of the claim form to be sent by the tribunal staff to a regulator.

12 It follows that from the face of the claim form the claimant does not say explicitly that she intends to make a claim either arising from a protected disclosure or for disability discrimination. However, the claimant's first position is that it is implicit from the claim form taken as a whole that she intended to pursue both such claims. The claimant's second position is that the balance of prejudice lies in favour of the granting of any application to amend that may be needed.

<u>The response form</u>

13 The response form was presented on 20 December 2018. Both of the explicit claims (unfair constructive dismissal and breach of contract) are disputed by the respondent. The scope of the claim form is addressed directly at paragraphs 4 and 5 of the respondent's Grounds of Resistance (page 25). At paragraph 4 the respondent says that the claimant's claims are not particularised "to any material extent" and are "difficult for the respondent to understand". Nevertheless, the respondent identifies two explicit claims as the basis of the claimant's case as a whole. The respondent did not ask the claimant to provide further information on the claims she was intending to pursue. Rather it sought to define the scope of the claim form as the respondent understood it.

Case management

14 This application to amend arose when deadlock was reached between the parties while they were attempting to agree a list of issues for the tribunal's determination. On 22 March 2019 emails were exchanged between the parties on the scope of the claim (page 99). The respondent's solicitors told

the claimant that she would need to amend her claim if she wished to include (amongst other things) claims for whistleblowing and disability discrimination. The claimant told the respondent that no such amendment was necessary (pages 99 – 100).

15 On 27 March 2019 the dispute over the scope of the claim came to the attention of the tribunal in the form of an email from the claimant in which she sought to "clarify [her] claim" by explicitly including claims for whistleblowing and for discrimination based on disability (page 37-38). That email also listed certain alleged detriments. On 1 April 2019 the respondent sent a letter to the tribunal (pages 39-41) disputing that this was a matter of clarification and expressing the need for the respondent to understand clearly the causes of action that the claimant is pursuing and for the grounds of these causes of actions to be made clear too. The respondent also reserved its position on whether any potential additional (on its view) claims had been presented within the required time limits.

16 On 12 May 2019, the issue came before EJ Lewis who took the view that the claim form did not include a claim for either whistleblowing or disability discrimination. He requested the claimant to provide further information about both claims by 30 May 2019 (pages 45-46) before seeking permission to amend.

17 The claimant replied to the tribunal on 20 May 2019 ("the Written Response") (pages 53-63). A good deal of that document sets out the claimant's account of wrongdoing at the respondent's various operational sites rather than focusing on the disclosures that the claimant says she made to her employer, the acts of alleged discrimination and the alleged detriments. This document casts light on the claimant's intention behind ticking box 10.1 on the claim form since she makes clear in the Written Response that she wants some form of regulatory investigation into the respondent's standard of care and general operational practices. That is of course not the function of an employment tribunal. It is a function reserved to prescribed authorities in certain regulated industries. That the claimant wanted there to be an investigation into the respondent's operational practices is supported by the claimant's statement at box 8.2 of the claim form that a "big part of the reason" for her claim is for her employer "to be fully investigated so that vulnerable service users can be protected from harm". However, the claimant's Written Response (page 45-46) also includes matters that can properly be regarded as potential protected disclosures; allegations of disability discrimination; and alleged detriments.

18 By a letter of 13 June 2019 (pages 64-65) Employment Judge Smail listed this preliminary hearing. At the same time he directed the claimant to serve a witness statement dealing with (1) why she had not made a clear whistleblowing claim from the outset; (2) why it had taken her until 20 May 2019 to provide details of these claims; and (3) the basis on which she claims to be a disabled person at the time she says she was discriminated against. The claimant's witness statement dealing with these points is at pages 66-75 of the bundle.

Potential protected disclosures, detriments, and dismissal

Protected disclosure

19 The claimant is applying (should an amendment be necessary) to introduce claims of whistleblowing detriment and automatic unfair dismissal on the grounds that she made a protected disclosure. The following potential protected disclosures can be identified from the further information (the Written response and the Witness Statement) provided by the claimant. At page 55, the claimant says she told Mr. Conor Copas of the respondent that the clients should not be providing their own PPE. At page 56 the claimant says she reported to Judy Layne that two service users had suspicious bruising on their knees in the same spot. Also at page 56, the claimant says that she reported similar concerns to "Conor, Patti, Jamie, Deborah and Moses" (all of whom were employed by the respondent at the relevant time). At page 57 the claimant says she "emailed management" about a service user illegally occupying the respondent's Antrim Grove site. Also at page 57, the claimant says, "she expressed concern" about the safety of colleagues and service users. The tribunal notes that these allegations do not contain the level of detail that EJ Lewis had requested, particularly in terms of dates.

Detriment

20 Section 47B of the Employment Rights Act ("the ERA") makes it unlawful for a worker to be subjected to any detriment by her employer for any act or deliberate failure to act on the grounds that the worker has made a protected disclosure. The following potential detriments under section 47B ERA can be identified from the further information provided by the claimant.

21 In her Written Response the claimant says she has suffered "a series of detriments contrary to section 47B of ERA" (page 55). However, as already noted, most of the claimant's Written Response does not refer to the treatment of the claimant by the respondent. It mostly makes allegations of mistreatment of service users; mistreatment of the claimant's work colleagues; and poor management practices. However, as the tribunal understands the claimant's Written Response, her claim is that she was treated as a problematic employee for two reason: sickness absence and making protected disclosures.

22 In the whistleblowing section of the Written Response there is only one detriment specifically linked to a protected disclosure. That detriment is that she was asked to lie by management about a service user illegally occupying the respondent's Antrim Grove site. However, taking the Written response as a whole the claimant puts her case on a broader basis, and it would be unfair on her to limit the alleged whistleblowing detriments to that single incident. The final section of the Written Response is headed, "What happened to [the claimant] that [the claimant] wants the tribunal to hear about?" The first numbered point refers to whistleblowing. The tribunal therefore considers the claimant's application to amend includes as potential detriments under section 47B all the numbered points 2-11 on page 59 of the bundle. In particular,

22.1 her dismissal;
22.2 being asked to lie by management about a service user illegally occupying the Antrim grove site;
22.3 being ignored by HR, the director and the management team regarding sick pay and NVQ;
22.4 the attempt not to pay sick pay
22.5 the late payment of her sick pay and salary;
22.6 the cancellation of shifts;
22.7 not being offered shifts when they were available;
22.8 the denial of training and development opportunities;
22.9 the failure to support her to complete an NVQ;
22.10 the overlooking and dismissing of her concerns;
22.11 the failure to provide a return to work interview;
22.12 the failure to refer her to occupational health; and
22.13 the failure to keep in contact during sickness absence

Dismissal

23 At point 1 page 59 of the Written Response the claimant says, *"I was dismissed because I made a protected disclosure".* Her application to amend therefore includes an application to bring a claim under section 103A ERA. Section 103A ERA makes a dismissal automatically unfair if the reason or principal reason for that dismissal is that the employee has made a protected disclosure.

Allegations of disability discrimination

24 The claimant is applying (should an amendment be necessary) to introduce claims of disability discrimination. The scope of the amendment is to introduce claims for (1) direct discrimination under section 13 of the Equality Act 2010 ("the EqA"); (2) discrimination arising from disability under section 15 EqA; and a failure to make adjustments under section 20 EqA.

Direct discrimination – section 13 EqA

25 The clamant says that her treatment by the respondent was either because of her disability, because of her protected disclosure or a mixture of the two. On that basis the claimant is relying on the same detriments (other than in respect of the Antrim Grove matter at 22.2 above) in respect of both causes of action. The following detriments/ dismissal are relied upon as less favourable treatment:

25.1 her dismissal;
25.2 being ignored by HR, the director and the management team regarding sick pay and NVQ;
25.3 the attempt not to pay sick pay;
25.4 the late payment of her sick pay and salary;
25.5 the cancellation of shifts;
25.6 not being offered shifts when they were available;
25.7 the denial of training and development opportunities;
25.8 the failure to support her to complete an NVQ;

25.9 the overlooking and dismissing of her concerns;
25.10 the failure to provide a return to work interview;
25.11 the failure to refer her to occupational health; and
25.12 the failure to keep in contact during sickness absence

Discrimination arising from disability – section 15 EqA

26 The claimant says that, "the act to terminate the contract [of employment] was premeditated. My contract was terminated due to me having a disability and for claiming sick pay". The "something arising" under section 15(1)(a) EqA is the claiming of sick pay.

Duty to make adjustments – section 20 EqA

27 The claimant says that several of the matters identified as direct discrimination also amount to the respondent failing to make adjustments. Specifically:

27.1 Inviting the claimant to a return to work interview;
27.2 Allowing the claimant a phased return to work;
27.3 Providing a contact for support;
27.4 Making enquiries of the claimant during sick leave;
27.5 Arranging a referral to occupational health.

28 The respondent denies that any of these matters involve unlawful whistleblowing detriment, automatic unfair dismissal or disability discrimination against the claimant. In very broad terms, the respondent's position is that the claimant failed to comply with its policies and procedures regarding sickness absence. The effect of that failure was that many of the absence management steps that would normally have been taken were not taken. At the time of the claimant's dismissal, the claimant appeared to the respondent not to have undertaken any work in the previous 3 months before her dismissal. This generated a standard letter removing the claimant from the respondent's bank of available workers. The respondent says there is nothing discriminatory in that and that the mistaken position was rectified by the respondent offering to place the claimant back on the bank.

The relevant legal principles

29 The tribunal's power to grant leave to amend a claim is an exercise of its wide general power to make a case management order under Rule 29, Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.** Guidance on the approach a tribunal ought to adopt when considering such an application is provided in the case law. In particular in Selkent Bus co Ltd v Moore [1996] IRLR 661 EAT where Mr Justice Mummery (as he then was) emphasised that whenever the discretion to grant an amendment is invoked the tribunal should take into account all the relevant circumstances and in particular should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. As to what are the relevant circumstances Mr

Justice Mummery, while emphasising that attempting an exhaustive list is undesirable, identified the following as certainly relevant:

> **"22. (5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following 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. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.**
>
> **23. (b) The applicability of time limits**
>
> **If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, eg, in the case of unfair dismissal, s.67 of the 1978 Act.**
>
> **24. (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 laid 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. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."**

30 It is also helpful to have regard to the decision of the Court of Appeal in Abercrombie and Others v Aga Rangemaster Ltd [2014] ICR 209, in which the principal judgment was given by Lord Justice Underhill. At paragraph 47 of his judgment, Underhill LJ sets out the material passages from the judgment in the Selkent case and then continues:

> "47. … If the final sentence of point (5)(a) is taken in isolation it could be understood as an indication that the fact that a pleading introduces "a new cause of action" would of itself weigh heavily against amendment. However, it is clear from the passage as a whole that Mummery J was not advocating so formalistic an approach. He refers to "the … substitution of other labels for facts already pleaded" as an example of the kind of case where (other things being equal) amendment should readily be permitted - the contrast being with "the making of entirely new factual allegations which change the basis of the existing claim". (It is perhaps worth emphasising that head (5) of Mummery J's guidance in Selkent's case was not intended as prescribing some kind of a tick-box exercise. As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4).)"

31 At paragraph 48 of his judgment Lord Justice Underhill continued:

> "48. Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry 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. …"

32 At paragraph 50 Lord Justice Underhill said the following:

> "50. As to point (b), it is true that fresh proceedings under section 34 of the 1996 Act would have been out of time. Mummery J says in his guidance in Selkent … that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded - and a fortiori in a relabelling case - justice does not require the same approach: NB that in High Court proceedings amendments to introduce "new claims" out of time are permissible where "the new cause of action arises out of the same facts or substantially the same facts as are already in issue" (Limitation Act 1980, section 35(5)). In the circumstances of the present case the fact that the claim under section 34 would have been out of time if brought in fresh proceedings seems to me to be a factor of no real weight. There is, as I have already said, no question of any specific prejudice to the respondent from the claim being reformulated after the expiry of the time limit."

33 The specific question of an application to amend an existing claim of unfair dismissal to include a complaint of automatic unfair dismissal under section 103A ERA was considered in the EAT by Mr Justice Underhill (as he then was) in Evershed v New Star Asset Management UKEAT/0249/09. Acknowledging that this gave rise to a new basis of claim (see paragraph 15), the EAT made clear that the weight to be attached to that fact would depend on the extent of the difference between the original and the new basis of claim. The tribunal in that case had considered that the amendment would require wholly different evidence but the EAT was unable to see it had explained the basis of that assertion, which was not considered self-evident; that, it held, was an error of law. Turning itself to look at the proposed amendment, the EAT did not consider that the amended claim would in fact require wholly different evidence to be adduced from that required by the original claim (see paragraph 22); that undermined the Tribunal's view of prejudice and the EAT considered the amendment should be allowed.

34 In Pruzhanskaya v International Trade & Exhibitors (JY) Ltd UKEAT0046/18 the EAT held that amendments to unfair dismissal claims to allege a new reason for dismissal, whether an 'ordinary' reason such as conduct or an 'automatic' reason such as the making of a protected disclosure did not involve the bringing of a new complaint with a new time limit. However, in Evershed v New Star Asset Management it was acknowledged by Mr Justice Underhill that to amend an existing unfair dismissal claim to include a complaint of automatic unfairness under section 103A ERA did give rise to a new basis of claim.

Time limits

Whistleblowing detriment time limits

35 In respect of a claim based on being subjected to a detriment on the grounds that a worker made a protected disclosure, the primary time limit is 3 months from the date of the act or failure to act complained of or, where

there is a series of similar acts or failures, 3 months from the last act or failure to act (section 48(3)(a) ERA). Time can be extended where it was not reasonably practicable for the complaint to be brought in time provided that the claim was brought within such further period that the tribunal considers reasonable (section 48(3)(b) ERA).

Whistleblowing dismissal time limits

36 In respect of a claim based on dismissal for having made a protected disclosure the primary time limit is 3 months from the effective date of termination (section 111(2)(a) ERA) or within such further period as the tribunal considers reasonable in a case where the tribunal is satisfied that it was not reasonably practicable to bring the claim within 3 months (section 111(2)(b) ERA).

Disability discrimination time limits

37 In respect of a claim for disability discrimination, the primary time limit is 3 months from the date of the act to which the complaint relates (section123(1)(a) Equality Act 2010 ("the EqA") and the tribunal has a discretion to grant an extension of time for such other period as the tribunal thinks just and equitable (section 123(1)(b) EqA). In cases of conduct by an employer extending over a period that conduct is treated as done at the end of that period (section 123(3)(b) ERA). The discretion to extend time on a just and equitable basis has been held to be as wide as that given to the Civil Courts by Section 33 of the Limitation Act 1980 see British Coal Corporation v Keeble DBP v Marshall [1997] IRLR 336. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension having regard to all of the circumstances, in particular: -

37.1 the length of and the reason for the delay;
37.2 the extent to which the cogency of the evidence is likely to be affected by the delay;

38 extent to which the parties sued had cooperated with any the request for information;

39 the promptness with which the claimant acted once he or she knew of the facts giving rise to the course of action; and

40 the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Presidential guidance

41 The tribunal was referred by Mr Kelly to the Presidential Guidance on Case Management of January 2018. Guidance Note 1 specifically deals with amendment to the claim and to the response. Paragraph 12 to Guidance Note 1 specifically says that where an amendment introduces a new cause of action the tribunal should consider whether the new claim is in time by applying the relevant time limits (including the relevant powers to extend the primary time limits) for any new claim. However, this guidance must be

considered in the light of the Court of Appeal's judgment in Abercrombie where Lord Justice Underhill says that where an amendment is closely connected with the claim as originally pleaded….justice does not require the same approach [to the time limits]: NB that in High Court proceedings amendments to introduce "new claims" out of time are permissible where "the new cause of action arises out of the same facts or substantially the same facts as are already in issue."

Submissions

The claimant's case

42 The tribunal understood the claimant to be putting her case in three ways. First, she says that there is no need for any amendment of her claim. She says that (1) a claim for whistleblowing detriment, (2) a claim for automatically unfair dismissal for whistleblowing and (3) a claim for disability discrimination are all already contained within her claim as presented. Secondly, she says that to the extent that is not so, all three amendments are a re-labelling of the facts already explicitly relied upon in her claim and the tribunal should therefore readily agree to her application to amend. Thirdly, she says that to the extent it is not a re-labelling exercise the balance of prejudice is in her favour and the tribunal should grant her application to amend on all three grounds.

The respondent's case

43 The tribunal has carefully considered the written and oral submissions on behalf of the respondent. Put simply, the respondent says that the claim form does not contain either a claim for whistleblowing or for disability discrimination. This is therefore an application to amend. This is not a re-labelling exercise. It is the introduction of substantially new claims. The threshold in Selkent for such amendments is not met for either claim. These amendments are both substantially out of time.

My conclusion on the amendment application

44 The tribunal does not agree with the claimant's submission that claims for whistleblowing and disability discrimination are already contained in the claim form. The tribunal finds that the reason why the claimant ticked box 10.1 is that she wanted there to be an investigation into the respondent's operational practices. For understandable reasons, the claimant has had difficulty in appreciating the distinction between concerns about the respondent's operations on the one hand and, on the other hand, detriments she may have personally suffered as an employee as a result of drawing those perceived failures to the attention of her employer. The tribunal finds that the claimant mistakenly believed that by raising operational concerns which she had drawn to the attention of her employer that she was also saying that this was the reason why she had suffered detriments and why she had been dismissed. Similarly, the claim form does not contain any claim for disability discrimination. When the claimant ticked box 8.2 the tribunal finds that she was again looking for recommendations about the respondent's operational practices rather than making an

individual claim of unlawful discrimination. Again, the tribunal finds that the claimant had difficulty in appreciating the distinction between treatment she received as an employee and the perceived organisational shortcomings she had raised with her employer.

45 This matter therefore needs to be treated as an application to amend the claim form and the tribunal must apply the principles in Selkent and Abercrombie together with the other case referred to above.

46 The tribunal does not consider that the amendment is a re-labelling exercise. This is because the claimant provided very little detail in the claim form as a result of which it is not possible to reformulate it as a claim for whistleblowing or discrimination. The main factual allegations were introduced for the first time in the Written Response and in such a way as to change the basis for the claim and to introduce new cause of action. The effect of that is that the application to amend was made after the expiry of the principal time limits. The tribunal has considered the case of Evershed and Pruzhanskaya and come to the conclusion that this is an application to introduce a new claim on the basis that there is nothing in the detail of the claim form which sets out a factual platform from which a whistleblowing detriment/automatic unfair dismissal claim can be formulated. The decision of the tribunal needs therefore to be decided on the relative injustice and hardship involved in refusing or granting the application.

47 From the claimant's perspective granting the amendment would not require the tribunal to consider substantially different area of enquiry. The claimant is claiming constructive dismissal on a "last straw" basis the effect of which will be to require the tribunal to consider the matters that cumulatively led the claimant to resign from her employment. On the particular facts of this case that will inevitably have required tribunal to consider the claimant's allegation of protected disclosures and less favourable treatment related to her sickness absence which absence she says was related to a disability. That is the practical reality of this claim despite the lack of detail in the claim form itself. In short, the claimant's narrative explaining the accumulation of matters remains essentially the same in support of her claim for "ordinary" unfair dismissal and for automatically unfair dismissal. In either case the evidence that will needed to be called by both parties will essentially be the same whether or not the amendment is granted. As a result, there will not be a substantial new enquiry into different factual issues if the amendment is allowed.

48 Furthermore, the tribunal accepts the claimant's evidence that she genuinely believed that she had done enough to indicate a claim for whistleblowing and discrimination from the outset. Although this belief was genuine the tribunal finds that it was mistaken and wrong to the extent that she seeks to rely on her internal grievances to which no reference was made in the claim form. The claimant's access to professional advice was limited despite the efforts that she made to contact her union and despite her frustrated attempts to access free legal advice from law centres prepared to help her. Such advice as she did receive was to some extent unhelpful to the claimant, in particular advice that she was not able to bring a claim beyond "ordinary" unfair dismissal. When it became clear to the

claimant that she might need to amend her claim she responded promptly both to EJ Lewis and to EJ Smail's requests and directions. Those responses were full, prompt and ultimately provided sufficient information to allow the respondent to know the case it has to meet on both amended claims. The claimant first "clarified" her claim on 27 March expressly referring to claims for whistleblowing and disability discrimination. These claims were refined in the Written Response and a credible explanation for the delay was provided by the claimant in her witness statement (pages 66-75). Having accepted that the claimant genuinely believed that she had already made clear the scope of her claim, the claimant then promptly did what she thought was being asked of her by both EJ Lewis and EL Smail in terms of amplifying her claim and explaining her delay.

49 If the claimant is not allowed to amend, she would suffer prejudice to the extent that key aspects to her challenges to her alleged treatment in the workplace and dismissal would go undetermined despite the factual allegation to support those claims being put in issue in witness statements being essentially the same in any event. To that extent there will be no material increase in the costs to be incurred by the parties if the amendment is granted. There is also time available to the respondent to prepare its defence to both additional claims well in advance of the final hearing since case management is still at a relatively early stage.

50 From the respondent's perspective if the application is granted it will have to face two substantive claims that are not expressly contained in the claim form both of which expose the respondent to compensation which is not subject to a statutory cap. Further, the effect of allowing the amendment will mean that claims are being allowed which are substantially outside the primary time limits for each cause of action. It would also have been a relatively simple matter for the claimant to have made the scope of her intended claims at the outset. The claim form is designed for use by lay people and, as Mr Kelly pointed out, the claimant was only required to tick two boxes first to indicate a claim of discrimination and secondly, to indicate that such a claim was on the grounds a disability. The tribunal also heard evidence that a number of people to whom alleged disclosures were made have now left the employment of the respondent. That said, it was not suggested these individuals have become inaccessible to the respondent as witnesses.

Was the claimant disabled within the meaning of section6 of the EqA?

51 The claimant was employed between 14 June 2015 and 1 August 2018. In order for a claim of disability discrimination to succeed the claimant must have been a disabled person at the time she alleges she was discriminated against. The definition of a disabled person is contained in section 6 of the EqA. Section 6 is in the following terms:

> **6 Disability**
>
> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

"Long term" is defined in paragraph 2 of schedule 1 of the EqA in the following terms:

> (1) The effect of an impairment is long-term if—
>
> (a) it has lasted for at least 12 months,
> (b) it is likely to last for at least 12 months, or
> (c) it is likely to last for the rest of the life of the person affected.

52 The tribunal has also had regard to the Guidance on the definition of disability (2011) ("the Guidance").

53 The tribunal accepts what the claimant has to say about her medical condition in her witness statement (on which she was cross-examined) as entirely truthful. She provided fitness notes to her employer which identified a mental health condition. She did not always provide those notes in a timely manner but that does not detract from the nature of her medical condition at the material time. The claimant says that she suffers from stress, anxiety and depression. That is potentially a mental impairment. The claimant has other conditions: endometriosis and a hearing impairment. Her endometriosis was exacerbated by her anxiety and depression. The claimant gave no evidence on the effect of her endometriosis on her day to day activities.

54 The claimant's first diagnosis of stress at work came in November 2017. She remained on sick leave until her employment terminated in August 2018. The claimant was unable to work for the last 10 months of her employment. The claimant's evidence in her witness statement on the effect of her condition on her day to day activities was in the following terms. She was unable to cook, clean or to take care of herself and she was unable to concentrate on tasks (page 73). During cross-examination, the claimant said that during this period she "tended to spend most of the day in bed". She "did not go outside as such". She said she was not doing "normal activities" which she described as "not getting up", "not having a shower" and "not making breakfast, she could not "engage in conversation with others" and felt "overwhelmed". She says her position got gradually worse between October 2017 and July 2018. She says she has "good times and bad times". In May 2018 she was prescribed an anti-depressant (Sertraline) for a period of 56 days. There is no repeat (or other) prescription from her GP after that. She attributes her mental health problems to the way she says she was treated and what she says she witnessed at work. She also says that her mental health continued to be impaired after she left the respondent's employment in August 2018, one effect of which was that she was too unwell to find new employment.

55 The respondent says that a labelling of depression does not amount to a disability. The respondent refers to J v DLA Piper UK LLP [2010] IRLR 936 and the importance of the distinction between a diagnosis of clinical depression and a state of mental affairs that is a reaction to life events. The respondent points out that the claimant was prescribed anti-depressants for only a limited period.

My conclusions on the claimant's disability status

56 The tribunal finds that the claimant was a disabled person in accordance with section 6 of the EqA and the Guidance. The relevant time of her disability for the purposes of this claim is between November 2017 and the termination of her employment on 1 August 2018.

57 The claimant's stress/anxiety/depression was a mental impairment. In accordance with A4 of the Guidance the determinative matter is the effect of the impairment on the claimant's ability to carry out day-to-day activities. The activities that the claimant referred to in her evidence (not being able to get up, shower, take care of herself or go outside etc.) are all day-to-day activities within the ordinary meaning of those words. Those activities fall squarely within the scope of D3 of the Guidance in that they are all things that people do on a regular or daily basis. In particular, having a conversation, getting washed and dressed and preparing and eating food. Plainly those effects go beyond the normal differences in ability that may exist among people and are more than minor or trivial (Guidance B1). The effect on the claimant goes well beyond the reaction to life events considered not to be a disability in the DLA Piper case. The tribunal accepts the claimant's evidence that her condition has lasted since November 2017 and has continued after that date beyond the termination of her employment such that it has lasted for 12 months.

Awareness.

58

59 The respondent says that the primary time limit for both claims expires on 1 March 2019 being three months before the date of the application. The respondent goes further and says that the last allegation of unfavourable disability treatment occurred on 30 July 2018 with the effect that the primary time limit expired on 29 October 2018. However, that ignores the fact that the claimant says that her dismissal was an act of disability discrimination. She makes this link factually in her claim form, "they terminated my contract in a very calculated manner whilst on sick leave" and in her Written Response, "I was discriminated against for taking stress, depression and anxiety related sick leave from work. The claimant's case is put on the basis of conduct by the respondent extending over a period ending with her alleged dismissal. When considered in those terms the lateness of the new claims is considerable shorter than the respondent identifies.

60 The tribunal has weighed the balance of prejudice and exercises its discretion in favour of granting the amendments for both the whistleblowing and disability claims. Given the fact that the tribunal considers that essentially the same evidence will be heard whether or not the amendment is granted it is in the interests of justice that the claimant is allowed to pursue all of the claims that she says arise out of that factual base. The tribunal does not consider the fact that certain witnesses have now left the respondent's employment to be a materially prejudicial factor not least because there is no suggestion that these witnesses are not capable of being contacted and asked to provide statements and to attend the tribunal.

61 In allowing these amendments the tribunal is conscious that the respondent needs to be able prepare its case. Accordingly, the scope of the whistleblowing claim will be limited to the alleged protected disclosures identified at paragraph 19; the detriments/dismissal at paragraph 22. The scope of the disability claim is limited to the matters identified at paragraph 25 to 27 above.

Listing

62 That conclusion means that there will be the hearing which the claimant, Mr Dennis and I agree should start **on at Watford Employment Tribunal, 2nd Floor, Radius House, 51 Clarendon Road, Watford, Hertfordshire WD17 1HP, starting at 10 am or as soon as possible afterwards**. The time estimate for the hearing is **days**, based on (1) the claimant's intention to give evidence herself, (2) the respondent's intention to call 2 or 3 witnesses, (3) the parties attending by 9.30am at the latest on 2 September 2021 with copies of the hearing bundle and witness statements, and (4) on the following provisional timetable:

62.1 2 hours for reading in;

62.2 1 hour for the cross-examination and the tribunal's questions asked of the claimant;

62.3 1 ½ hours for the cross-examination and the tribunal's questions asked of the respondent's witnesses;

62.4 1 hour for oral submissions (half each);

62.5 a day for the tribunal to determine the issues which it has to decide, reach its conclusions on liability (which will include not only the question whether the claimant is owed holiday pay but, if she is owed such pay, its amount), prepare its judgment with reasons, give them orally and, if the claim of unfair dismissal succeeds, decide what remedy the claimant should receive for that dismissal.

Other matters

63 The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/

64 The parties are reminded that all 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.

65 The parties are reminded of rule 92, which is in these terms:

> 'Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use

of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.'

If, when writing to the tribunal, either of the parties does not comply with this rule, then the tribunal may decide not to consider what that party has written.

66 The parties are also reminded of their obligation under rule 2 to assist the tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the tribunal.

67 The following orders were made by agreement with the parties.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

Amendment to the claim

1 The claimant has permission to amend her claim in the manner stated in the judgment of the tribunal.

Amended response to the claim

2 The respondent may rely on an amended response to the claim as it now stands by virtue of order number 1 above. Such amended response must be sent to the tribunal and the claimant **by 4pm on the day which is 28 days after the respondent receives this document**.

List of issues

3 The parties must seek to agree a list of issues **by 4pm on the day which is 28 days after the date for compliance with order number 2 above.**

Disclosure

4 It is ordered that the parties will give simultaneous disclosure of any documents relevant to the issues identified as described by the provision of a list of documents and copies of the documents on the list, to arrive on or before **4.00 pm on 2020**. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they (1) assist the party who produces them or any other party, or (2) appear to be neutral.

5 The parties shall comply with the date for disclosure given above, but if despite their best endeavours, documents to come to light (or are created) after that date, then those documents must be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

Bundle of documents

6 It is ordered that the respondent will have primary responsibility for the creation of the single joint bundle of documents required for the hearing of the claims. The respondent must prepare a bundle of all the documents disclosed by both parties.

7 The respondent is ordered to provide to the claimant a full, indexed, paginated bundle on or before **4.00 pm 2020**.

8 In preparing the bundle the following rules must be observed:

8.1 unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle

8.2 the documents in the bundle must follow a logical sequence which should normally be simple chronological order.

9 The respondent is to bring to the hearing 3 copies of the bundle for the use of the tribunal.

Witness statements

10 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the tribunal, relevant to the issues as described above. They must not include generalisations, argument, hypothesis or irrelevant material.

11 The facts must be set out in numbered paragraphs on numbered pages, in chronological order.

12 If a witness intends to refer to a document, the page number in the bundle must be stated.

13 It is ordered that witness statements are exchanged so as to arrive on or before **4.00 pm on 2021.** The parties must bring 3 (additional) copies of their witness statements to the hearing.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under section 7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 54 or 57 or hold a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative

_____
Employment Judge Loy

Date: 30/06/2020

Sent to the parties on: 30/06/2020

Jon Marlowe
For the Tribunal Office