EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Miss N Mkwananzi	AND	Karen MacLachlan (1)
		Livewell Southwest CIC (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 13 August 2020
In Chambers, by telephone

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **Dr C Tene, Solicitor**
For the Respondents: **Mr N Gill, Solicitor**

JUDGMENT ON APPLICATION TO AMEND

1. The claimant's application to amend the originating application to include a claim of victimisation is granted; and
2. The claimant's claims against the first named respondent Karen McLachlan are all dismissed on withdrawal by the claimant.

REASONS

1. In this case the claimant seeks leave to amend the claim which is currently before the Tribunal, and the respondents oppose that application. I have considered the factual and legal submissions from the solicitors on behalf of the respective parties.
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 second respondent is an independent social enterprise which provides integrated health and social care services. The claimant Miss Nobuhle Mkwananzi describes herself as being of Black African national origin. She was employed by the second respondent as a Staff Nurse from 4 March 2019 to 31 October 2019. The first respondent was the claimant's line manager.

5. The claimant had raised concerns with the second respondent about her employment position on 30 September 2019. She resigned her employment on 31 October 2019. She subsequently raised a formal grievance on 15 November 2019. She commenced the Early Conciliation process with ACAS, and the dates on the relevant certificate are: Day A - 26 November 2019; and Day B - 28 November 2019. The claimant then issued her originating application on 3 January 2020. She had access to advice from the Royal College of Nursing at that time. The originating application was served by the Tribunal office on the respondents on 15 January 2020. The originating application raised two heads of claim alleging race discrimination: direct discrimination under section 13 of the Equality Act 2010 ("the EqA"); and for harassment on the grounds of race under section 26 EqA. A response was entered on behalf of both respondents on 12 February 2020 denying the claims.
6. Meanwhile the claimant had applied for alternative employment, and this application was successful subject to the receipt of satisfactory references. A reference was supplied by Mr D Reffold on behalf of the second respondent. It was a short reference which confirmed that the claimant's timekeeping, honesty, and general behaviour were all "Good", but in reply to the answers to whether the second respondent would re-employ the claimant, Mr Reffold replied "No" and added: "Could not work within the team - mediation attempted to resolve issues. Nobuhle stated she was traumatised by her experiences with ward members."
7. The claimant was informed on 16 January 2020 that her offer of employment was withdrawn because of an adverse reference. She did not know at that stage the contents of the reference. On raising further enquiry, the claimant received an email on 5 February 2020 from her prospective new employers suggesting that this was because of a poor reference resulting from an earlier grievance.
8. The claimant then attended a grievance hearing on 4 March 2020, and served further and better particulars of her other discrimination claims on 27 March 2020. She did not raise the matter of the reference either at the grievance hearing or in her further and better particulars. There was no suggestion then that she wished to pursue a claim of victimisation based on the provision of the reference.
9. Following a subject access request, the claimant was aware of the exact details of the reference when she received a copy on 15 July 2020. Although it had apparently been sent to her earlier on 25 June 2020, it seems that it had only been received in her junk email and she was not aware of the detail until 15 July 2020. The claimant subsequently made an application to amend her claim on 30 July 2020.
10. <u>The nature and detail of the application to amend:</u>
11. The claimant's application is as follows. The claimant applies to amend her claim to add a claim of victimisation under section 27 EqA. Two protected acts are relied upon. The first is submitting a formal grievance to the second respondent, and the second is issuing these Employment Tribunal proceedings. The proposed amendment alleges that the second respondent provided a "bad and misleading reference" to a prospective employer and that by doing so the respondent subjected the claimant to detriment, and this was because the claimant had done the protected acts.
12. During the course of this hearing the claimant also confirmed that she wished to withdraw her claims against the first named respondent Karen McLachlan, so that the sole remaining respondent to the claimant's claims (including in respect of her proposed amendment to include the claim of victimisation) is her former employer Livewell Southwest CIC.

13. The respondents oppose the application to amend. In the first place they assert that it is out of time. Given that the claimant was informed on 16 January 2020 that the offer of employment had been withdrawn by her prospective employer as a direct result of the reference, she was required to present a claim within three months of that date (in other words by 15 April 2020) subject to any appropriate extension under the ACAS Early Conciliation provisions. The claimant has sought to present this victimisation claim only on 30 July 2020, some three months out of time, and does not have the appropriate ACAS Early Conciliation Certificate for that purpose. The claimant had access to professional advice from the Royal College of Nursing at that time, and no explanation has been given for the delay.
14. The respondents add that the claimant's allegation that she was effectively "punished" for the protected act of issuing these proceedings is clearly nonsensical given that the reference had been given on 6 January 2020 before these proceedings were even served on the respondent by letter dated 15 January 2020. In addition, the proposed victimisation claim is against both respondents, and the first respondent (the claimant's previous line manager) was not involved in the provision of the reference.
15. <u>The applicable law:</u>
16. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of <u>Chapman v Simon</u> [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.
17. In <u>Cocking v Sandhurst (Stationers) Ltd and anor</u> [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 <u>Selkent Bus Company Ltd v Moore</u> [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in <u>Ali v Office of National Statistics</u> [2005] IRLR 201 CA.
18. In <u>Transport and General Workers' Union v Safeway Stores Limited</u> 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 <u>Cocking</u> test, and, specifically, no review of all the circumstances including the relative balance of injustice.
19. The EAT held in <u>Selkent Bus Company Ltd v Moore</u> [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:
20. <u>1 - The nature of the proposed amendment</u> - 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
21. <u>2 - The applicability of time limits</u> - 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; and

22. 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.
23. 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:
24. 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.
25. 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).
26. 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".
27. 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.
28. 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).
29. 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).

30. 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.
31. 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.
32. Judgment:
33. Applying these legal principles above to the current application, I find as follows.
34. In the first place, I find that the proposed amendment does add a new cause of action but is one which is linked to, or arises out of the same facts as, the original claim. I find therefore that it comes within the definition of "relabelling", and is an addition to an existing race discrimination claim which was validly presented within time. That being the case, and applying Foxtons Ltd v Ruwiel, it does not matter that the amendment was not brought within the time limit which would otherwise have applied to the claim.
35. It therefore falls to me to apply the Cocking test, and, specifically, to review of all the circumstances including the relative balance of injustice.
36. I find that the relative balance of injustice lies in favour of allowing the application to amend. We are still at an early stage in these proceedings, and an agreed trial bundle of documents and written witness statements have not yet been prepared and exchanged. There has not been any inordinate delay and the respondent is still in a position to seek detailed instructions in its defence of the proposed victimisation claim, and on the basis that it is able to defend the claim, the respondent cannot be said to be prejudiced by allowing the amendment.
37. On the other hand, to refuse the amendment would deny the claimant the opportunity to have this aspect of the discrimination claim determined by an Employment Tribunal. She would still have the opportunity of pursuing a tortious claim in connection with the disputed reference in the County Court, and it is surely in the interests of justice and in accordance with the Overriding Objective that this dispute should be determined at one hearing before the Employment Tribunal with its specialist knowledge of the discrimination legislation.

38. During the course of his hearing it became clear that the proposed victimisation claim would not be pursued again Karen McLachlan personally, and also that the claimant no longer relies upon the issuing of these tribunal proceedings as a protected act upon which the victimisation claim relies.
39. In conclusion therefore, I grant the application to amend the claimant's claim to include the claim of victimisation, which as clarified in a case management order of today's date, is limited to one protected act (the claimant's formal grievance dated 15 November 2019); and one detriment (the alleged provision of a "bad and misleading" reference by the respondent), which is said to have been suffered by the claimant as a result of the raising of her grievance.

Employment Judge N J Roper
Dated 13 August 2020