EMPLOYMENT TRIBUNALS

Claimant: Miss AB

Respondent: Her Majesty's Commissioners of Revenue and Customs

Heard at: Cardiff **On:** 24 September 2019

Before: Employment Judge S Jenkins

Representation
Claimant: In person
Respondent: Mr J Allsop (Counsel)

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The Claimant initially submitted a claim form on 19 January 2019, pursuing the claims, which now remain, of discrimination on the ground of sex and victimisation. Prior to a telephone preliminary hearing on 21 May 2019, the Claimant indicated that she wished to amend her claim and, following that hearing, she was ordered to provide written particulars of her application to amend within 28 days. The Claimant subsequently submitted the required document on 20 June 2019, to which the Respondent objected.

2. At a further preliminary hearing on 16 August 2019, at which the Claimant had the benefit of being represented by an ELIPS adviser, Employment Judge Moore issued a Case Management Summary setting a final hearing of the Claimant's claims for seven days commencing on 2 March 2020 and setting out the issues to be considered at that hearing, which were stated as having been agreed with the Claimant. Judge Moore also directed that this preliminary hearing be held to determine the Claimant's amendment application, as clarified at the 16 August 2019 hearing, should the Respondent continue to object to it. She also directed that, if the Respondent chose to apply, the hearing would consider an application by the Respondent for a strike out or deposit order.

3. In the event, the Respondent's representative confirmed in a letter of 11 September 2019 that it did not object to the Claimant's claims as clarified at the case management hearing on 16 August 2019 being treated as her claims for the purposes of these proceedings. Also, in relation to the strike out or deposit order application, Mr Allsop confirmed that the Respondent was not currently pursuing such an application, but may seek to do so in the future.

4. To an extent therefore, the issues to be considered at this preliminary hearing, as identified by Judge Moore, had been addressed. However, following the August hearing the Claimant made four further applications to amend her claim and the parties were notified by the tribunal, on 20 September 2019, that that all issues would be discussed at this preliminary hearing.

5. I therefore considered the various applications to amend noting the applications themselves. The first was in an attachment to an email of 19 August 2019 to add in three additional issues to the list of issues agreed at the preliminary hearing on 16 August 2019 which the Claimant indicated she felt had been missed. The second application was by letter of 3 September 2019, in which the Claimant referred to having received documents from the Respondent in relation to an internal grievance process. These, she indicated, enabled her to better understand the issues raised which led her to making the application to amend. In her letter, the Claimant sought to reintroduce several paragraphs, and indeed claims, from her original ET1 claim form, and to add several further claims. She also sought to add in two of the Respondent's employees as individually named Respondents. I noted on reading the Claimant's application that all the incidents referred to appeared to have arisen between the months of April 2018 and September 2018.

6. The third amendment application was made by email on 6 September 2019, which sought to clarify the existing complaints of sexual harassment relating to an incident on 19 November 2018. The final application was submitted by email on 9 September, which was an application to add in complaints of detriment on the ground of having made a protected disclosure, the stated protected disclosures having related to allegations of criminal conduct that the Claimant had made in August 2018.

Issues and law

7. I noted that Rule 29 of the Employment Tribunal Rules of Procedure ("Rules") gave me a broad discretion to make case management orders, which included allowing me to accept amendments to claims. However, I was conscious that I needed to exercise that discretion in furtherance of the overriding objective as set out in Rule 2, which is to deal with cases fairly and justly, having regard to a number of issues, including proportionality, expense and delay.

8. With specific reference to amendment applications, I was conscious of the detailed Presidential Guidance on the making of amendments and how they are to be considered, and I was also mindful of the guidance provided by the case of Selkent Bus Co Ltd v Moore [1996] ICR 836. which had

previously provided direction as to how tribunals should address applications to amend.

9. The guidance provided by Selkent and the Presidential Guidance was that the key principle when considering the exercise of discretion to allow an amendment is to have regard to all the circumstances, and in particular any injustice or hardship resulting from an amendment or refusal to amend. In the Selkent case, case the Employment Appeal Tribunal set out a non-exhaustive list of relevant factors which are to be taken into account in considering the required balancing exercise, having regard to the interests of justice and the relative hardship that will 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.

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

11. With regard to time limits, the Presidential Guidance notes that the fact that the relevant time limit for presenting a new claim has expired will not exclude the discretion to allow the amendment, but 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 should take into account the tests extending time limits, which in the context of discrimination and victimisation claims is whether it is just and equitable to extend time.

12. In that respect, there have been several appeal cases which have provided guidance to employment tribunals as to how to consider the extension of time. Notably the Court of Appeal, in Bexley Community Centre v Robertson [2003] IRLR 424, observed that time limits are there to be complied with and there should be no automatic consideration that an application which is outside original time limits should be accepted; it is for the Claimant to establish why it should be accepted.

13. I also noted the test for extending time set out in the case of British Coal Corporation v Keeble [1997] IRLR 336, which confirmed that it will 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. 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 requests for information, the promptness with which the claimant acted once he or she knew 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; although not all those may

necessarily be relevant in each particular case.

Conclusions

14. Applying the law outlined above, having considered in detail the Claimant's various applications to amend, and the guidance provided by the Presidential Guidance and the Selkent case, I concluded that none of the Claimant's applications to amend should be granted.

15. I was mindful of the terms of the overriding objective and the need to deal with cases, indeed all cases before tribunals not purely this particular case, fairly and justly. I noted that the issues identified by Employment Judge Moore at the preliminary hearing on 16 August 2019, had been reached following a full day's hearing at which the Claimant had had the benefit of assistance from an ELIPS Adviser. I also noted that Judge Moore had stated that the issues set out in her Case Management Summary had been identified following discussion and agreement with the Claimant.

16. I was conscious that the full hearing of this case is now a little over five months away, and there is a need for that tribunal, and indeed the parties, to understand the issues that have to be dealt with at that hearing. There is a need, therefore, for finality in relation to the issues that will be considered at that hearing. I did not therefore consider that it would be in furtherance of the overriding objective for further amendments to be made to the agreed position reached at that 16 August 2019 hearing. Further amendments to the claim, and the need then to allow time for amendments to the response, could jeopardise that current listing and other cases are already waiting to be heard.

17. In addition, and looking specifically at the Presidential Guidance and the Selkent guidance, I noted that much of the Claimant's applications related to issues which had been addressed by her in her original claim form. Indeed, the largest of her applications, that made on 3 September 2019, was stated as having arisen following receipt of documents from the Respondent in August 2019 which related to incidents which had taken place between April 2018 and September 2018, and which appeared to have been canvassed in the Claimant's original application form. The most recent application, that of 9 September 2019, to add in claims of protected disclosure detriment, all related to circumstances in August 2018 which could have been addressed in the original claim form, and which therefore appeared to be out of time.

18. In addition therefore to my view over the application of the overriding objective, applying the Presidential Guidance and the Selkent guidance, I considered that the interests of justice militated against granting the amendment. The Claimant already has claims covering a range of periods which will be considered by the tribunal in March 2020, and to allow amendments and additions will be likely to cause hardship to the Respondent in return for potentially little additional benefit to the Claimant.

19. Furthermore, the issues covered by the proposed amendments all appear to relate to matters which occurred in 2018 and which either were canvassed in the Claimant's original claim form or could have been canvassed in that claim form. Notwithstanding that the Claimant is a litigant

in person, she had the benefit of advice at the hearing on 16th of August 2019, and there is no clear reason why the matters could not have been addressed earlier. Taking into account the relevant factors set out in section 33 of the Limitation Act 1980, as outlined at paragraph 12 above, I did not consider it appropriate to extend time to allow any amendment which was, on its face, out of time.

20. It was therefore, in my view, not appropriate to allow the applications.

Employment Judge S Jenkins

18 October 2019
Date

REASONS SENT TO THE PARTIES ON

.....20 October 2019.....

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FOR THE TRIBUNAL OFFICE