EMPLOYMENT TRIBUNALS

Claimant: **Ms M Rooney**

Respondent: **Leicester City Council**

Heard at: **Leicester (via Cloud Video Platform)**

On: **9 November 2020**

Before: **Employment Judge Ahmed (sitting alone)**

Representation
Claimant: **In person**
Respondent: **Ms J Slipper, Solicitor**

JUDGMENT AT A PRELIMINARY HEARING

The Claimant's application for an amendment of her claim to include a complaint of having suffered detriment by reason of making a protected disclosure is refused.

REASONS

1. In these proceedings the Claimant brings complaints of constructive unfair dismissal, unlawful deduction of wages, disability discrimination, sex discrimination, harassment and victimisation.

2. The complaint of holiday pay has been dismissed upon withdrawal.

3. A Preliminary Hearing was held on 1 November 2019 to determine which complaints, if any, should be struck out as having no reasonable prospects of success and also to determine whether the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010.

4. The complaint of sex discrimination was struck out as having no reasonable prospect of success. The Claimant was found not to be a 'disabled person' and accordingly the complaint of disability discrimination was also struck out. The complaints of harassment and victimisation were dismissed. The complaints of constructive unfair dismissal, outstanding expenses and other unlawful deduction of wages were permitted to go through to a final hearing.

5. The Claimant has subsequently appealed some of the decisions to the Employment Appeal Tribunal. There is a Rule 3(10) hearing on 23 February 2021 (one of the days listed for full merits hearing of this case) and the hearing of one of the appeals against striking out has been listed for hearing on 16 March 2021. Ms Slipper on behalf of the Respondent indicates that they shall be applying for the full merits hearing listed in February 2021 to be postponed as a result but there is no such application before me today.

6. The purpose of this hearing was to determine the Claimant's application to add a complaint of detriment for making a protected disclosure. The application was made on 17 July 2020. In support of the application Ms Rooney has submitted a witness statement which I have considered. She also proposed to call Mr Andy Betts, her trade union representative, to give evidence. Mr Betts was however unable to join the hearing via video but did so on the telephone. However, as I explained at the commencement of this hearing the nature of the application did not require oral evidence.

7. The application to add a whistleblowing complaint centres on events in March 2018. In her witness statement Ms Rooney says that on 14 March 2018 she had to leave the office suddenly following a disagreement with her line manager who had instructed another Social Worker not to speak to her after the Claimant had raised serious safeguarding concerns regarding a high risk/high profile child sexual exploitation case. The Claimant says that before she left the office she e-mailed her line manager of her notice of resignation and at the same time requested a meeting regarding her concerns.

8. On the following day, 15 March 2018, whilst the Claimant was completing her case recordings she discovered that she was denied access to her work account. She then sent a confidential e-mail to the safeguarding service manager, Ms Jordan, raising serious safeguarding concerns about an incident which had allegedly taken place on 19 February 2018. The Claimant was concerned about the potential danger to the health and safety of the young person involved whose mother had told the Claimant a couple of weeks earlier that her daughter had been raped whilst in the care of the respondent. The Claimant sent an e-mail to Ms Jordan on 20 March which she believes was a protected disclosure. The Claimant says that unknown to her at the time, the request for confidentiality was not respected. When she received the bundle for the final hearing in these proceedings she discovered that Ms Jordan had breached confidentiality to the Claimant's service manager and other managers who, as a result, then harassed and intimidated the Claimant whilst she was on sick leave between 22 - 27 March 2018. The Claimant claims that as a direct result of this protected disclosure she was subjected to detriment and that her managers became even more hostile towards her than previously.

9. The application for an amendment is opposed. Ms Slipper has made detailed written submissions which I have taken into consideration in arriving at my decision.

10. In coming to my decision I take into consideration the guidance set out in the leading case on amendments, namely **Selkent Bus Company v Moore** [1996] IRLR 661. In doing so have taken into consideration all of the circumstances relevant to the application as set out in the material submitted by both the Claimant and Ms Slipper.

11. The guidance in **Selkent** is set out in the headnote to that case which is as follows:

> "In deciding whether to exercise its discretion to grant leave for amendment of an originating application a tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Relevant circumstances include:
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> (a) The nature of the amendment, ie whether the amendment sought is a minor matter such as the correction of clerical and typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels for facts already pleaded to, or, on the other hand, whether it is a substantial alteration making entirely new factual allegations which change the basis of the existing claim.
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> (b) The applicability of statutory 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.
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> (c) The timing and manner of the application. Although the tribunal rules do not lay down any time limit for the making of amendments, and an application should not be refused solely because there has been a delay in making it, it is relevant to consider why the application was not made earlier. An application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then and not earlier, particularly where the new facts alleged must have been within the knowledge of the applicant at the time the originating application was presented."

CONCLUSIONS

12. This is clearly not a minor amendment such as the correction of a clerical or typing error. I do not accept the submission by Ms Rooney that this is a genuine re-labelling exercise as clearly further factual information would be necessary to explain the elements of the new cause of action which are not already part of the pleaded case. The application seeks to add a new cause of action and a fairly major one at that. This is therefore a substantial proposed alteration to the existing claim.

13. The next consideration is time limits. Any fresh claim for whistleblowing detriment would, if brought or issued now, be well out of time. The Claimant's employment ended on 29 October 2018. She contacted ACAS for early conciliation on 19 September 2018. The early conciliation certificate was issued as long ago as 26 September 2018. If one takes, for the sake of argument, the

effective date of termination as the last possible date when the detriment could have occurred the time limit for presentation of this complaint expired on 29 January 2019. The time limit may have expired even be earlier if the detriment was, as it appears to be, sooner than the effective date of termination. Extensions for time on whistleblowing detriment claims can only be made on the "not reasonably practicable" basis. The Claimant has provided no evidence to support a possible argument that it was not reasonably practicable for the claim to have been presented in time.

14. On the contrary, there is material to suggest that it *was* reasonably practicable for the claim to be made in time. The Claimant was legally represented by a firm of solicitors at the time of the presentation of her first claim (case number 2600242/2019). Far from making a whistleblowing complaint her then solicitors made it clear that they were *not* making such a claim and went out of their way to do so. Paragraph 42 of the ET1 says, inter alia:

> "To clarify, the Claimant is not suggesting that she made a protected disclosure as a result of which she was subjected to a detriment."

15. The Claimant says that her solicitors were professionally negligent and those were not her instructions. That is however a matter between her and her former solicitors. I must take the pleaded case as it stands.

16. I note that the Claimant then had legal advice from a different firm of solicitors, and after them representation or advice from direct access counsel. However, no application to amend was made by either of them on the Claimant's behalf. The Claimant also appears to have had advice and representation from her trade union throughout the relevant time. There is no reasonable explanation for the delay in making this application given the access to advice.

17. In relation to the timing and the manner of the application, I have dealt with that to some extent already. In addition I note that the final hearing on the merits of this case is listed in February 2021. To allow the amendment now would certainly put that hearing in jeopardy. It may well be that it will be postponed in any event but as things stand it remains in the list.

18. In all of the circumstances I therefore consider that the balance of hardship favours the Respondent and for the reasons given the application to amend is refused.

19. There was no application for any consequential case management orders.

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Employment Judge Ahmed

Date: 2 December 2020

JUDGMENT SENT TO THE PARTIES ON

3 December 2020

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FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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