



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms D Hickey

**Respondent:** My Space Housing Solutions

**Heard at:** Manchester

**On:** 5 February 2021

**Before:** Employment Judge Sharkett

## REPRESENTATION:

**Claimant:** Ms Stanley of Counsel

**Respondent:** Mr Melia - consultant

## JUDGMENT

- (a) The claimant has permission to amend her claim and rely on Allegation 16 of the Scott Schedule
- (b) BY consent it is agreed that Allegation 17 of the Scott Schedule is not an amendment but rather further detail of facts already pleaded and can be relied upon by the claimant.
- (c) Permission to amend is refused in respect of Allegation 10 of the Scott Schedule.

## REASONS

1. This Preliminary Hearing was to consider an application by the claimant to amend her claim. The respondent also sought to have claims struck out on the basis that they were out of time and/or had no reasonable or little prospects of success. At the previous preliminary hearing Employment Judge

Feeney had ordered the respondent to make an application in writing if it wished to apply for a strike out/ deposit order. No such application had been made. In respect of the time issue after hearing submissions from both parties, I concluded that this was a matter that would be more appropriately determined at the final hearing given that the claimant relied on a course of conduct in pursuing her claims.

2. Due to technical difficulties experienced both with accessing the bundles, and with sound issues that arose late in the afternoon of 12 January, it was not possible to conclude the claimant's application to amend her claim and it has reconvened, part heard, today 5 February 2021. Both parties were given an opportunity to repeat their submissions to ensure that neither party was disadvantaged by the technical difficulties experienced on 12 January 2021.

### **Submissions**

3. It is the respondent's case that the claimant has introduced four new allegations in her Scott Schedule. The claimant disputes this on the basis that the facts of the same are clearly pleaded in the ET1 and are a matter of relabelling only.
4. During the course of the hearing on 12 January 2021, the Claimant indicated that she no longer relied on Allegation 19 and withdrew the same. Mr Melia conceded that Allegation 17 which refers to the claimant dismissal, is a matter of relabelling only as the fact of the dismissal is pleaded in the ET1. Consequently the application to amend now relates to only two Allegations, they being Allegation 10 and Allegation 16

### Allegation 10

5. This is an allegation that the claimant regularly (from 28 October 2019 and ongoing), had to take telephone calls from outside the building or alternatively in her car so that she could hear properly. The application sought is to include a claim of a failure to make a reasonable adjustment and discrimination arising from disability.
6. Ms Stanley submits that the facts of this claim are already pleaded and it is simply a matter a new legal label, not a material amendment.
7. It is the respondent's case that this is an entirely new claim that is not pleaded in the ET1. The respondent argues that the reference to this fact is at paragraph 23 of the ET1 in which the claimant refers only to taking the calls in her car for privacy reasons.

### 8. Allegation 16

9. This Allegation is that the claimant's grievance meeting carried on for six hours with only one brief adjournment which had to be asked for by the claimant's representative. The application is to include a claim of a failure to

make a reasonable adjustment, discrimination arising from disability and a claim of harassment. Ms Stanley submits that the facts of this allegation are pleaded and that this is simply a relabelling exercise.

10. Whilst the respondent accepts that the facts are mentioned in the ET1 Mr Melia submits that they are included only to set out the factual background of what happened.
11. In respect of both allegations Mr Melia submits that the claimant has been legally represented from the outset and these are not new facts that have arisen since the claimant first submitted her claim. He submits that the respondent will be significantly prejudiced if the Tribunal allow the amendments. In respect of Allegation 10 which dates back to October 2019, Mr Melia submits that the claimant never raised this as a grievance or issue whilst employed, and the respondent would have difficulty obtaining witnesses evidence from the managers involved at that time, five of which are not now employed by the respondent. In respect of Allegation 16, Mr Melia submits that an external contractor carried out the grievance hearing and that this individual may not be willing to give witness evidence. In addition he submits that obtaining this evidence and requiring the individual to attend to give oral evidence would result in significant expense to the respondent.
12. Mr Melia submits that by comparison the claimant will not be prejudiced if the Tribunal refuse the application to amend her claim to include these two additional Allegations as she has her other claims that she can still pursue.
13. Ms Stanley submits that the respondent has always been aware of the facts and matters arising out of Allegation 10 and 16 and, that both Allegations if allowed to proceed have good prospects of success. She submits that to refuse the amendment would prejudice the claimant because she would be denied the right to bring her claims.

## The Law

14. In the case of **Selkent Bus Company Limited -v- Moore 1996 ICR 836**, the Employment Appeal Tribunal endorsed the key principle that when exercising its discretion in an amendment application, Tribunals must have regard to all the circumstances and in particular, any injustice or hardship which would result from the amendment or refusal to make it.
15. In that case, Mr Justice Mummery outlined that a Tribunal will need to consider: -
  - (i) The nature of the amendment: is it minor or substantial;
  - (ii) The applicability of time limits – if a new claim is proposed by way of amendment, whether the new course of action is in time or whether time limits should be extended;

- (iii) The timing and manner of the application.
16. Guidance Note one of the Presidential Guidance on general case management, at paragraph 12 states “if the claimant seeks to bring a new claim, the Tribunal must consider whether the new claim is in time”.
17. However, at paragraph 11.2 Tribunals are reminded that even if no new facts are pleaded, the Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
18. Before any time limit issues are considered, it is incumbent on the Tribunal to consider the nature of the proposed amendment.
19. In the case of **Abercrombie and Others -v- Aga Range Master Limited 2013 IRLR 953** the Court of Appeal determined that when considering a new allegation amendment, Tribunals should focus on:

**“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”.**

## Discussion and Conclusion

20. In respect of both Allegations I have reminded myself that the core test in either allowing or refusing the application is the balance of injustice or hardship between the parties.
21. Ms Stanley relies on paragraph 23 of the ET1 to show that the facts of Allegation 10 are already pleaded and that this is not a material amendment to the claim. In reaching my conclusion that this is a new claim I have had regard to both paragraphs 22 and 23 of the ET1 to ensure that I have not missed the context in which the fact of the claimant going outside to make calls has been pleaded. Having established that this is a new claim because the ET1 clearly refers to a desire for privacy as the reason for the claimant going outside to take calls, I have regard to the timing and manner of the application, the prospects of success or defence and any practical problems in responding to the new claim should it be allowed.
22. I do not accept Mr Melia’s submission that as the claimant has other claims to pursue she would not be prejudiced if the application was refused. However, I note that the complaint raised by the claimant in Allegation 10 dates back to October 2019, and her first claim was submitted on 27 March 2020. The claimant then submitted a further claim form on 3 July 2020 in which she raises the facts relating to Allegation 16. The claimant was legally represented when both claims were submitted and both claims relate to the ongoing complaints of the claimant in relation to her treatment and dismissal, which are referenced again in her second claim form. An application to amend the

first claim form was not made when the second claim was issued and I have not been told of any reason why that was the case. The application to amend the claim to include this Allegation was not made until November 2020. Mr Melia argues that the respondent would have difficulty obtaining witness evidence in respect of this Allegation because this was not a matter that was raised as part of the claimant's grievance and the respondent is not aware that it was ever raised as an issue at all. In addition he explained that five of the managers are apparently no longer with the respondent and it would be difficult to identify who it would be able to obtain evidence from. I accept that this poses a practical problem for the respondent who would have difficulty responding to the claim if it is unable to have access to those who managed the claimant at the time. I accept that is unlikely that the respondent would have the ability to obtain relevant witness evidence given the circumstances described by Mr Melia. Having considered the submissions of both parties and considered the circumstances in the round, I find the balance of injustice and hardship in respect of this Allegation falls more heavily on the respondent and for this reason, the application in respect of Allegation 10 is refused.

23. In respect of Allegation 16 Ms Stanley submits that the facts of the grievance meeting and the duration of the same are pleaded at paragraph 14 of the second ET1. Mr Melia accepts that the second ET1 references the grievance meeting but submits that this just sets out the factual background and is not a fact relied on. I find that whilst it might not be clear from paragraph 14 that the claimant complains of a failure to make a reasonable adjustment, it does clearly set out the fact that the claimant is complaining about the manner in which the hearing was conducted and the distress she experienced because of it. It is also clear that her distress and complaint relates to both the lack of breaks and the references to her disability. These are facts that the respondent has known of since the second claim was issued and I do not accept Mr Melia's submission that the respondent would be prejudiced if the amendment was allowed because the grievance hearing was conducted by an external consultant. I have not been told that the respondent is unable to contact the external consultant and in the event that the person concerned is unwilling to attend the Tribunal to give witness evidence then the Respondent is at liberty to make the appropriate application to order their attendance. I find that all three of the claims pursued by the claimant arising out of the facts pleaded in paragraph 14 are arguable and that in these circumstances the injustice and hardship to the claimant in refusing the amendment would be far outweighed by any hardship to the respondent in granting it not least of which because the respondent has been aware of the facts since the claim was submitted. The application to amend the claim to include Allegation 16 is allowed.

Employment Judge Sharkett

Date 4 March 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 March 2021

FOR THE TRIBUNAL OFFICE