EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102784/2020

Held remotely at Glasgow on 26 October 2020

Employment Judge R King

Mrs D McColm	**Claimant** **Represented by:** **Mr Tinston - Solicitor**
Beauty Outlet Ltd	**Respondent** **Represented by:** **Ms Morgan - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's amendments dated 21 August 2020 and 10 September 2020 are allowed.

REASONS

1. Both parties were content that the hearing take place remotely given the implications of the COVID-19 pandemic. It was an audio (A) hearing held entirely by telephone. The parties did not object to that format.

2. On 26 May 2020, the claimant presented an ET1 setting out claims that the respondent had discriminated against her contrary to sections 18(2) and 26 (1) of the Equality Act 2010. A further ET1 in identical terms was then submitted on 10 July 2020.

3. Having instructed solicitors the claimant's representative then sought to add a claim of unfair constructive dismissal in terms of section 99 of the Employment Rights Act 1996 by including that in section 2.2 of the PH agenda submitted on 21 August 2020.

4. Subsequently, on 10 September 2020, the claimant's representative presented to the employment Tribunal a “Schedule of Acts of Discrimination”, which contained five new allegations in addition to the 24 allegations set out in the original ET1. This schedule was presented on the basis that it would tend to show that the claimant had suffered a continuing act of discrimination up to 28 December 2019, which was 3 months less one day before she commenced Acas early conciliation. The claimant accepts that it contains five additional allegations that were not made in the original ET1.

5. The respondent opposes the claimant's attempt to introduce a claim of unfair constructive dismissal in circumstances where it argues that such a claim had not previously been foreshadowed in the ET1. It also objects to the five additional allegations being introduced at this stage in the proceedings and asserts that they should be 'struck out', albeit they have not yet been allowed.

6. In determining the amendment application, the Tribunal had regard to the existing pleadings, the claimant's PH agenda presented on 21 August 2020 and the claimant's schedule presented on 10 September 2020. It also had the benefit of helpful written skeleton arguments on behalf of both parties. The Tribunal also invited both representatives to make oral submissions in support of their own skeleton arguments and in response to the other party's submissions.

Claimant’s submissions

7. Mr Tinston referred to the schedule of acts of discrimination presented on 10 September 2020. This contained 29 separate allegations of breaches of the Equality Act 2010.

8. He highlighted the five allegations that had not been included in the claimant’s original ET1 but were now included in the schedule, which were as follows:

    a. Allegation 3 - on 9 November 2018, the claimant was not given and was then discouraged from applying for a 30 hour per week role with the respondent;

b. Allegation 13 - on 8 April 2019, the claimant was asked to move her car further away from her place of work even though she had reached an agreement with security staff to park in the retail car park closer to the store;

c. Allegation 18 - on 25 April 2019, the claimant's manager questioned her why a tour of the maternity hospital would take place on a Sunday, thus appearing to question the claimant's honesty and integrity;

d. Allegation 21 - on 22 May 2019, the claimant called the respondent's HR department but did not receive a call back;

e. Allegation 23 - between May 2019 and her resignation on 26 February 2020, during her maternity leave, the claimant was not invited on any work's nights out;

9. Relying on the guidance on ***Selkent Bus Company vs Moore [1996] IRLR 661***, Mr Tinston submitted that the amendment merely added factual details to existing allegations, which could, in accordance with Selkent, include adding a new complaint to a continuing act of discrimination. The claimant was not adding new facts that changed the basis of the claim. The additional five allegations formed part of a continuing act of pregnancy discrimination and harassment related to sex between November 2018 and March 2020 that had been identified in the original claim.

10. In the alternative, Mr Tinston submitted that if the Tribunal found the claimant was seeking to change the basis of her claim, it would be just and equitable to extend time.

11. The claimant was alleging a regular course of discrimination by the respondent, and in particular by her former line manager, Marie Livingston, with some acts dating back to 9 November 2018. Her ability to include full details of all the allegations in the original claim submitted on 26 May 2020 had been obstructed by the following:

- Her memory of all the acts, many of which occurred between November 2018 and May 2019;

- Her deteriorating mental health; and
- Her inability to obtain any legal advice prior to lodging her claims, which was further impacted by the COVID-19 pandemic.

12. It had always been the claimant's intention to submit further and better particulars of her claim once she had secured legal advice but her priority was to lodge a thorough but concise claim before the original time limit expired. In line with the EAT's guidance in ***C v D UKEAT/CO132/19/RN***, that approach was the correct one. Her ET1 had set out her legal claim with sufficient facts to provide fair notice but had not been in the detail one would expect to find in a witness statement.

13. Furthermore, a fair trial was clearly still possible if the amendment was allowed as no date had yet been fixed for the final hearing and the respondent therefore still had adequate time to investigate the new allegations.

14. Mr Tinston submitted that it would be appropriate to follow ***Galilee v Commissioner of Police of the Metropolis [2018] ICR 634*** and to consider allowing the amendments subject to time bar.

15. Mr Tinston also referred to the Court of Appeal case of ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ECWA Civ 40,*** which went further than Galilee and held that there was no requirement for the Tribunal to be satisfied there was a good reason for delay and that time may be extended even in the absence of a reason being given. Nevertheless, in the present case, the claimant had given genuine, valid and compelling reasons for not including the five acts or admissions set out in the amendment when she had made her original claim on 26 May 2020.

16. With regard to the claimant's attempt to introduce an unfair constructive dismissal claim, referring again to ***Selkent***, Mr Tinston submitted that the claimant was merely seeking to add a label to facts already pleaded, not least because she had been unaware until she received legal advice that she was permitted to bring a constructive dismissal claim in her particular

circumstances even though she had less than two years' continuous employment.

17. He submitted that the facts pled in the ET1 submitted on 26 May 2020 supported the claimant's claim of unfair constructive dismissal as it described a series of acts of discrimination, most of which involved her former manager Marie Livingston. She had also made it plain in her original claim form that she was unable to return to work at the Gretna store while Ms Livingstone still worked there. She had made it clear in no uncertain terms that she could no longer work for Ms Livingstone. Whilst not explicitly confirmed, it was clear from the facts pled in the ET1 that the claimant had no choice but to resign.

18. Mr Tinston submitted that it was relevant that at the time she had presented her claim form, she had been assisted only by her mother and had no legal representation. It was only subsequently that she had obtained legal advice but her first attempt had been appropriately detailed and concise standing her circumstances. The pandemic had also contributed to her delay.

19. Mr Tinston's firm had been instructed in August and had then taken steps promptly to set out her claims in the schedule dated 10 September 2020. If time bar was an issue then it would be just and equitable, in those circumstances, to allow these additional acts to be included in the claim.

20. Relying on the Galilee case, the Tribunal should allow the amendments subject to time bar in circumstances where there was a lot of evidence to be considered before a final decision on time bar could be made.

21. He submitted that the prejudice to the claimant if the application was refused would be greater than that to the respondent if it were allowed. The proceedings were still at a relatively early stage and no final hearing had been listed. To refuse the amendment would result in grave injustice to the claimant.

22. He did not accept that adding five acts to 24 existing acts would substantially increase or delay the hearing. The respondent had known since 10 September 2020 about the additional allegations and had ample opportunity

to review its records and consider its position. There had been no final hearing fixed and therefore there was no substantial prejudice to them if the amendment was allowed.

23. In response to Ms Morgan's assertion that the allegations in the amendment had not taken place during the protected period, Mr Tinston submitted that the protected period had begun in early November 2018 when she discovered she was pregnant and was still ongoing when the claimant left the respondent's employment in March 2020, at which point she was still on additional maternity leave. The incidents giving rise to the allegations had therefore occurred during the protected period.

Respondent's submissions

24. On the respondent's behalf, Ms Morgan opposed all parts of the amendment. Dealing firstly with the proposed amendment of the claimant's claim in terms of sections 18(2) and 26(1) of the Equality Act 2010 she pointed out that the new factual allegations had not been pleaded within the original ET1 dated 26 May 2020, the second ET1 dated 10 July 2020 or even in in any subsequent amendment application.

25. By setting out the additional allegations in the schedule submitted on 10 September without making a formal amendment application at that time, the claimant had instead sought to incorporate the new allegations into the claim in a way that was "*inconspicuous, underhanded and otherwise represents an abuse of process".* In the first place she submitted that the allegations should be struck out in terms of rule 37 (1)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 due to the unreasonable manner in which they had been presented.

26. Referring to ***Selkent*** and ***Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650,*** Ms Morgan dealt firstly with the nature of the amendment. She submitted that it sought to introduce five new courses of action and did not amount to a mere "relabelling" of facts already pled. Were it to be granted, the application to amend would introduce several new and substantial points in issue.

27. The new allegations were also time barred, having been presented significantly out of time on 10 September 2020 in circumstances where the time limit for the claims had expired, at the latest, by 25 July 2020.

28. Dealing with the question of time bar, Ms Morgan referred to the guidance in ***Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576.*** The claimant had failed to submit a formal application to amend her claim and had failed to present any submissions in support of extending the time limit. Her original claim form had been accompanied by lengthy pleadings pertaining to pregnancy and maternity discrimination and therefore she must have known of, but had elected to omit, the five new allegations now being introduced.

29. An extension of time should not be granted as even though the claimant was now professionally represented her application had not made any application for an extension of time, much less convinced the Tribunal that it would be just and equitable to do so. Referring to the Scottish EAT decision in ***Amey Services Limited & another v Aldridge & others UKEATS/0007/16***, she submitted that determining an amendment application is a single stage exercise and that an amendment could not be allowed "subject to time bar issues".

30. On the issues of injustice and hardship she submitted that granting the application would cause significant injustice and hardship to the respondent. The new complaints would open up new significant new lines of factual and legal enquiry. The respondent had already made progress in its preparation for a final hearing and if the amendment was allowed, the respondent would be obliged to amend its response, review its records and potentially revise witness and witness availability for the final hearing. Ms Morgan therefore contended that the respondent would be disproportionally prejudiced if the claimant was permitted to incorporate the new allegations into her existing claims. Allowing the amendment would also be contrary to the overriding objective as it would increase the formality of the proceedings and the related expense.

31. In respect of the constructive dismissal claim, Ms Morgan dealt firstly with the manner of the amendment. The claimant had failed to tick the box for unfair dismissal on the ET1 claim form dated 26 May 2020 or the one dated 10 July 2020. Furthermore, she had in neither ET1 pled a case of constructive dismissal or the basis upon which a constructive dismissal claim could have been understood to have been her intention.

32. For example, she had failed to make any reference to the word "resignation". There was no basis upon which the Tribunal should allow this new head of claim to be included within her claim. Again, Ms Morgan claimed that the claimant had sought to incorporate this new head of claim in a way that was *"inconspicuous, underhanded and otherwise represents an abuse of process"* and should be struck out in terms of rule 37 (1)(b) due to the unreasonable manner in which it had been presented.

33. Dealing with the nature of this element of the proposed amendment, she submitted that it went beyond a mere relabelling exercise. It was a completely new head of claim that would require a new line of factual and legal enquiry, which took the new allegations outside the scope of a relabelling exercise. It would introduce several new, and substantial points in issue:

- whether the respondent had fundamentally breached the claimant's contract of employment;
- if so, were any of the alleged breaches sufficiently important or fundamental to justify the claimant resigning or terminating her contract of employment;
- whether the claimant had affirmed any of the breaches;
- whether the claimant had resigned in response to the alleged breaches;
- if the claimant was found to have been dismissed, what was the potentially fair reason for dismissal;

34. In respect of timing, Ms Morgan submitted that this new head of claim had been presented on 26 August 2020 in the claimant's PH agenda, which was significantly out of time where the time limit for submitting that claim on time would have been 25 June 2020. Furthermore, the claimant had failed to present any reason as to why it would be just and equitable for the unfair constructive dismissal claim to be accepted out of time.

35. Referring again to the guidance in ***Bexley Community Centre***, Ms Morgan submitted that there was a wealth of freely accessible advice in the public domain on the possibility of presenting constructive unfair dismissal complaints and individuals routinely presented such complaints without professional legal advice. She had submitted an ET1 claim form on 26 May 2020 accompanied by lengthy pleadings in relation to pregnancy and maternity discrimination but had elected not to refer to any claim of constructive dismissal or even her resignation. That same omission had been repeated when she had submitted her second ET1 claim form on 10 July 2020.

36. In respect of this second element of the amendment, Ms Morgan again argued that the determination of an amendment application was a single stage exercise and that the amendment could not be allowed subject to time bar.

37. Turning to the merits of the claim, Ms Morgan submitted that the constructive unfair dismissal claim had no merit in any event. It was evident from the terms of her resignation email that she had resigned because she had decided to move south and could not get a transfer and not because of any fundamental breach or discriminatory act.

38. Dealing with the injustice and hardship of allowing this part of the amendment application, she submitted that granting the application to amend would cause significant injustice and hardship to the respondent and introducing significant dealings of factual and legal enquiry. The respondent had already made progress in this preparation for a final hearing and if any new lines of enquiry were opened up, it would be obliged to amend its response, review its records for any paperwork relevant to the new points in issue and potentially revise

witness and witness availability. As well as causing injustice and hardship, requiring the respondent to do that would be contrary to the overriding objective as it would increase the formality of the proceedings and related expense.

39. She submitted that the respondent would be disproportionately prejudiced if the claimant was permitted to incorporate the constructive dismissal claim into her existing claims. She already had "*two bites of the cherry"* to submit her correct legal pleadings and it would be unfair and prejudicial to the respondent to permit her to have a third. Rejecting the amendment would also be consistent with the overriding objective and avoid any injustice or hardship to the respondent.

40. Ms Morgan also submitted that the 9 November 2018 incident fell outside the protected period as she had only reported her stomach pains to her employer on 11 November 2018 and had only informed HR that she was pregnant on 22 November 2018. That incident therefore fell outside the protected period and had no connection with the other allegations set out in the ET1. Allegation 23, which related to events between 27 May 2019 and 27 February 2020, was also out of time as those events also fell outside the protected period and furthermore they had no prospect of success.

The relevant law

41. The leading authority is ***Selkent Bus Company Ltd trading as Stagecoach Selkent v Moore [1996] IRLR 661***, where the EAT confirmed that the 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, the relevant factors to be considered including:-

(1) The nature of the amendment, i.e. whether the amendment sought is minor, such as correction of typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels on facts already pled, or whether it is a substantial alteration making entirely new factual allegations which change the basis of the existing claim;

(2) The application of time limits, and in particular where a new claim is sought to be added by way of amendment whether that complaint is out of time and if so whether the time limit should be extended under the applicable statutory provisions;

(3) The timing and manner of the application.

42. In the subsequent case of ***Ladbrokes Racing Limited v Traynor UKEATS/0067/06***, the EAT held that:-

"20. When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship in allowing the amendment against the injustice and hardship of refusing it. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether 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 they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of a lesser quality than it would have been earlier."

43. In ***Abercrombie v Aga Rangemaster Limited [2013] IRLR 953*** Underhill LJ summarised the approach adopted by the EAT and Court of Appeal when considering applications to amend 'which arguably raise new causes of action', as follows -

"… 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."

44. Section 111 of the Employment Rights Act 1996 provides -

"111.— Complaints to [employment tribunal]1 .

(1) A complaint may be presented to an [*employment tribunal*]1 *against an employer by any person that he was unfairly dismissed by the employer.*

(2) [*Subject to the following provisions of this section*]2 *, an* [*employment tribunal*]1 *shall not consider a complaint under this section unless it is presented to the tribunal—*

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.'

45. Section 123 of the Equality Act 2010 provides -

"123 Time limits

(1) [Subject to [sections 140A and 140B]2 proceedings]1 on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."

Discussion and decision

Nature of amendment

46. Dealing firstly with the application to ament to include an unfair constructive dismissal claim, the Tribunal first of all finds that this must be considered on the basis of the pleadings as at the date of the amendment application, which is 21 August 2020.

47. This amendment does indeed seek to introduce a new head of claim under different statutory provisions from the claim originally presented. However it is significant that, in support of her constructive dismissal claim, the claimant does not seek to add any additional factual allegations to those already in the ET1, but relies only on the facts already pled.

48. It follows therefore that this amendment genuinely amounts to a relabelling of the allegations of discrimination and harassment already pled, which are sufficient to find an unfair constructive dismissal claim.

49. Turning to the five additional allegations of discrimination in terms of sections 18(2) and 26(2) of the Equality Act 2010, the Tribunal is satisfied that the allegations all form part of the same alleged continuing course of conduct set out in the claimant's ET1 in which she alleges that the respondent treated her unfavourably because of her pregnancy or pregnancy related illness and harassed her because of her sex. The new factual allegations do not introduce any additional heads of claim or any separate cause of action. They do not change the basis of the existing claim, but simply introduce new grounds in support of the existing claim.

50. Even if it had accepted that the five additional allegations introduced new causes of action, the Tribunal would still have found that they do not involve substantially different areas of inquiry from the claim originally pled. Rather, they merely introduce new factual allegations against the same group of the respondent's employees against whom the original allegations were laid, but without changing the basis of the statutory claims.

Time limits

51. It is not in dispute that the amendment applications are made out of time. The time limit in respect of the unfair constructive dismissal expired on 25 June 2020 but it was not presented until 21 August 2020. The time limit in relation to the discrimination allegations expired on 25 July 2020 and the amendment was not presented until 10 September 2020.

52. The Tribunal accepts that the claimant was initially unaware of her right to bring a claim of unfair constructive dismissal when she presented her ET1 and that it was only when she took professional advice that she became aware of her right to bring such a claim even though she did not have two years' service.

53. The Tribunal does not accept that it would not have been reasonably practicable for her to bring her unfair constructive dismissal claim in time. While it accepts that she was ignorant of her right to bring such a claim it does not accept that her ignorance was reasonable in circumstances where, even during the pandemic, there were sources of legal advice available to her and she did not seek to clarify her rights before bringing her claim.

54. However, the fact that it would have been reasonably practicable to present her unfair constructive dismissal claim in time is not an absolute bar to her amendment being allowed. In the circumstances of this amendment application it is significant that her unfair constructive dismissal claim is substantially related to the claim originally pled and relies on facts that have already been pled, which are sufficient to support both the discrimination and harassment claims and the unfair constructive dismissal claims. In all the circumstances, allowing this amendment would not prejudice the respondent or cause any injustice.

55. Turning to the additional allegations of discrimination, the relevant test is whether extending time would be just and equitable. In ***British Coal Corporation v Keeble 1997 IRLR 336, and DDP v Marshall 1998 IRLR 494***, the EAT held that Tribunals were required to consider the factors relevant to

the prejudice that each party would suffer if an extension were refused. These include:

- The length of and reasons for the delay;
- The extent to which the cogency of the evidence was likely to be affected by the delay;
- The extent to which the parties' sued had cooperated with any requests for information;
- The promptness with which the claimant acted once they knew of the possibility of taking action; and
- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

56. In this particular case, the delay was not significant and was caused by the claimant initially being unrepresented and also by the difficulties she faced in subsequently taking advice as a result of the COVID-19 pandemic. The Tribunal was satisfied that, once instructed, her solicitors had acted reasonably promptly in seeking to amend her claims.

57. In respect of the five additional allegations of discrimination and harassment there is no suggestion that any relevant witnesses have left the respondent's employment or that the additional allegations will need to be answered by different witnesses.

58. It is also significant that the majority of the allegations in the ET1 originally presented are against the claimant's former manager Marie Livingstone and the majority of the new allegations also relate to Ms Livingstone's treatment of the claimant. In all the circumstances, the Tribunal was not persuaded that the cogency of the evidence would be affected by the delay in bringing the new allegations.

The timing and the manner of the application

59. As at the date of the amendment application no substantive hearing has yet been fixed. There is still adequate time for the respondent to complete any necessary preparatory work in advance of the hearing. Although the Tribunal accepts that the respondent may incur additional expense in dealing with the new allegations, there is no suggestion that the respondent will face any difficulty investigating the additional allegations standing the fact that they are laid against the same group of witnesses as the original allegations pled. Nor is there any suggestion that evidence relevant to the new issues is no longer available or is of a lesser quality than it would have been earlier or that otherwise the respondent will be unable to prepare a defence to them. It is therefore unlikely that in allowing this amendment, any delay will ensue to the proceedings. It is also unlikely that any hearing will be lengthened significantly.

Prospects of success

60. The respondent has put in issue the merits of the amendment application to include a claim of unfair constructive dismissal. The Tribunal was satisfied that notwithstanding the respondent's criticism of the case pled it was nevertheless sufficiently pled to find a claim of unfair constructive dismissal and it could not be said that it had no prospects of success.

The balance of hardship

61. The paramount considerations for a Tribunal when considering an amendment application are the relative injustice and hardship involved in refusing or granting an amendment. Taking into account all of the relevant factors set out above, while it is accepted that there may be some additional costs to the respondent, and the length of the hearing may be extended, the injustice and hardship to the claimant of refusing the amendments would be greater than the injustice and hardship to the respondent of allowing them.

62. The claimant would suffer particular injustice were she to be deprived of the right to pursue her constructive dismissal claim, based as it is on the same facts as those originally pled within the statutory time limit.

63. In all the circumstances the claimant's amendments to include a claim of unfair constructive dismissal and to make additional allegations in support of her discrimination and harassment claims should be allowed.

Employment Judge: Robert King
Date of Judgment: 26 November 2020
Entered in register: 01 December 2020
and copied to parties