EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100065/20 (P)

Held on 28 December 2020

Employment Judge N M Hosie

Ms I Robertson	**Claimant** **Respondent** **Mr J Lee,** **Solicitor**
British Telecommunications PLC	**Respondent** **Represented by** **Mr P Corris,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's application to amend the claim, to include complaints of victimisation and harassment, is refused.

REASONS

1. This case has something of a history. The claimant's solicitor submitted a claim form on 24 December 2019. The details of the claim were extensive, running to some 86 numbered paragraphs in a paper apart to the claim form. Numerous discrimination complaints were advanced, on the basis of the protected characteristic of disability: direct discrimination; indirect

discrimination; discrimination arising from disability; and a failure to make reasonable adjustments.

2. A response form was submitted by the respondent's solicitor on 10 February 2020. The claim was denied in its entirety and the respondent's solicitor raised a number of preliminary issues.

3. I conducted a preliminary hearing to consider case management on 23 March 2020. The Note which I issued following that hearing is referred to for its terms.

4. Various procedures followed thereafter, until I conducted a further case management preliminary hearing on 4 November 2020. The Note which I issued following that hearing is referred to for its terms.

Claimant's application to amend

5. I recorded the following in my Note at para. 3:-

"*The claimant's solicitor attached to his e-mail of 3 November 2020 at 15:30 'clean and tracked copies' of an application to amend. The respondent's solicitor advised that he objected to the amendment, insofar as it sought to introduce complaints of victimisation and harassment (at paras. 86-90). I decided, in all the circumstances and having regard to the "overriding objective" in the Rules of Procedure, that that issue could be dealt with by way of written submissions.* ***Accordingly, I direct the parties, by no later than 19 November 2020 to make submissions in writing to the Tribunal, copied to the other party. I further direct the parties, by no later than 27 November 2020, to comment on the other party's written submissions, should they wish to do so.***"

Claimant's submissions

6. The claimant's solicitor made his submissions by e-mail on 19 November 2020 at 16:13.

7. Having set out the "background", the claimant's solicitor submitted, with reference to the Rules of Procedure, that it was competent at any stage in the proceedings for a party to seek to amend their claim. He then made the following submissions with reference to the two complaints which he sought to introduce:-

"***1. The 'Harassment' complaint***

We refer again to our e-mail with the adjusted application to amend of 3 November and to paragraphs 88-90 of the paper apart as adjusted.

The Respondent's objection to this in the end, as we understood it, was that this was an attempt to "get around" the, in the respondent's view compelling, litany of criticisms made of the proposed amendment application/claim prior to adjustment (on which strike-out and deposit order applications are said to be based). We do not propose to rehearse our comments on this criticism save to remind the Tribunal, that in our view they are in fact a detailed account of the Respondent's purported substantive defences. They are not grounds for deposit orders or strike-out. They are largely based on contested factual disputes.

That aside, our answer to the grounds of opposition offered thus far and, further, in support of the application are as follows:

a. *Whether or not it were the case that the amendment application was prompted in some way by the Respondent's objections, it is largely irrelevant to the factors the Tribunal ought to have regard to in exercise of its discretion – chiefly being the consideration of prejudice and, further, the extent to which this is not a relabelling exercise, in our view. Respectfully, it matters not, we suggest, that this may have been the case. That is denied in any event. The amendment application was reviewed. It was noted that on the facts, a harassment claim had been set out whilst the 'badge' of harassment had not been applied. Our application simply rectifies that position the reasons for it are that exercise alone.*

b. *Further, the application in terms refers to stated factual averments already pled – that is self-evident in terms of paragraph 88.1 to 88.12 which we*

do not restart here, in the interests of brevity. Accordingly, this is 'classic' relabelling.

c. *There is no material prejudice to the Respondent. Matters remain at an early stage procedurally. The Respondent was aware the facts referred to were a basis of complaints of discrimination and that these would require to be answered. In contrast, the Claimant by refusing the amendment, would be deprived of the statutory right of complaint she has, about factual matters of discrimination she has already raised.*

2. The 'Victimisation' complaint

Reference is made to paragraphs 86 and 87 of the paper apart. We would clarify that out Miss Mills originally proposed this application by e-mail of 6 May 2020. This was not the subject of recent proposed adjustment.

We submit as follows:

a. The Respondent suggests this is an 'entirely new claim'. We dispute that and contend that it is essentially a new label. Even in the event it was not, we submit respectfully the balance of judicial convenience favours the Claimant.

b. The Respondent refers to the 'protected act' and, in its view, the absence of specification of such an act. This is referred to at paragraph 87 of the paper apart as amended. It appears to us that the Respondent's agents proceed on the basis that a 'relabelling' can only take place where each and every fact is already pled re the proposed amendment. We disagree with that suggestion and refer to:

(i) TGWU v. Safeway Stores UKEAT/0092/07

*In which the EAT considered the Tribunal below had erred in refusing an amendment where the facts had already "**substantially**" been pled. Therefore, not each and every factual averment need be made and the absence of some oughtn't be fatal to an application to amend, provided this is 'substantially' already pled.*

It was further considered relevant that the Respondent in the circumstances would have expected the claim sought to be introduced – in that case, a failure to inform and consult.

c. *Paragraphs 86(a) and (b) of the proposed amendment refer to facts already pled for the Claimant. They are not in any way new. The application in terms refers to the information "above".*

d. *The pleaded information refers to the fact that the Claimant's representatives having been instructed and to their unsuccessful efforts*

to liaise with the Respondent in relation to issues arising from the background to this claim. It is accordingly plainly set out and would have been known to the Respondent (in fact this is on record):

(i) That she intended to contest her treatment via professional advisers; and a
(ii) That she objected to the specific treatment she was complained of against a background of concerns of discriminatory treatment; and
(iii) In any event, her objections to this treatment was clear from the previous pleadings unamended.

e. *Finally, against that background we contend the balance of judicial discretion ought to favour the Claimant – this is essentially a new 'label' on stated facts of contention known to the Respondent. The facts are already 'substantially' pled. To the extent there is any factual information, added, this would have been anticipated by the Respondent in the particular context referred to. She had involved professional advisers and objected to the Respondent's refusal to liaise with them. By refusing the application, the Claimant would in contrast be refused a specific head of statutory complaint. The Respondent's defence shall no doubt be on similar terms.*

In general, in terms of both applications we refer to both **Selkent** and **Cocking v. Sandhurst**. *These are well known to the Tribunal and we do not attach these for that reason. We respectfully suggest that for all these reasons set out above, the consideration of factors set out in those cases and overriding objective favours the Claimant.*"

Respondent's submissions

8. The respondent's solicitor made his submissions by e-mail on 19 November 2020 at 16:30.

9. He referred to the following cases in support of his submissions:

C v. D UKEAT/0132/19/RN*;*
Selkent Bus Co Ltd v. Moore [1996] ICR 836;
Kuznetsov v. Royal Bank of Scotland [2017] EWCA Civ 43;
Newsquest (Herald & Times) Ltd v. Keeping UKEATS/0051/09;
Land Registry v. Grant [2011] ICR 1390.

"Background"

10. The respondent's solicitor first set out the background to the claimant's application to amend. He said this:-

"*Having received the full response to that claim and then attended a preliminary hearing in March 2020, the Claimant indicated an intention to serve a fresh claim to include a claim of unfair dismissal. It is noteworthy that the first claim included a claim that the pending dismissal was discriminatory. The issue fresh claim* (sic) *was an informed decision taken through choice. In any event, the Claimant included further claims which lacked particularisation (breach of contract and unlawful deductions).*

Having taken this course of action the Claimant has since sought to amend the claims further. This has properly been described as a third or even fourth bite of the cherry for the Claimant. The Claimant has hitherto wholly failed to explain these actions."

11. The respondent's solicitor then went on to make the following submissions:-

"*As the matter presently stands, there are a large number of claims that purportedly commence in August 2017, over two years prior to the Claimant entering into ACAS Conciliation. These claims focus on 18 separate events which had been identified by the respondent (see the commentary document). This would require a lengthy Tribunal hearing and an excessive number of potential witnesses to attest to matters of some age. It had been anticipated that, following the preliminary hearing in March, the Claimant would properly seek to refine the claims. Instead, the claim has expanded significantly and repeatedly and, as it presently stands, it is excessive and unreasonably pleaded."*

12. The respondent's solicitor was also critical, with reference to ***C v. D***, of the "narrative format" of the claimant's pleadings and disputed, with reference to ***Selkent***, that the additional complaints (those of victimisation and harassment) could properly be categorised as "relabelling". He submitted that these complaints were "two entirely new causes of action".

Victimisation

13. The respondent's solicitor made the following submissions in relation to this proposed complaint:-

"*In respect of the victimisation claim, the Claimant now asserts that there was a protected act at some stage prior to an alleged refusal to action a SAR request and prior to an alleged refusal to correspond with the Claimant's representatives.*

These two alleged 'detriments' were expressly pleaded when the first claim as being PCPs for the claim of indirect discrimination (see paragraph 81(l) & (m) and the PCPs for the reasonable adjustments claim (paragraph 85(q) & (r). They were also relied on as unfavourable treatment for the s.15 claim (paragraph 83(e) & (f)).

It is entirely disingenuous to suggest that there is a simple re-labelling of that simple matrix. A claim of victimisation is an alliteration of specific treatment because an employee has made a protected act. Firstly, the Claimant fails to particularise when such an act was made. In any event, the amendment serves to reshape the claim entirely to allege a deliberate reaction to the Claimant having intimated a Tribunal claim or some other complaint or action foreseen by the relevant provisions of the Equality Act 2010."

14. The respondent's solicitor then went on to address the "***Selkent*** principles" in respect of which he made the following submissions:-

"*a. It is clear this is a new cause of action entirely (with a different motive or reason for treatment now asserted).*
b. This amendment (May 2020) is plainly out of time for it seeks to align detriments dated to 20 September 2019. It would not be just and equitable to extend time in the circumstances.
c. The Claimant wholly failed to explain why such an amendment was not sought sooner. These were facts known at the time the first claim was lodged. Further, the Claimant made no mention of such claims at the case management hearing in March 2020, or in the second claim which rehearses entirely the same narrative."

15. Finally, so far as the timing of the application was concerned, the respondent's solicitor made reference to the following passage from the Judgment of Lady Smith in ***Newsquest***:-

"*22. The fact that to allow an amendment would, in effect, enable a claimant to elide a statutory time bar does not necessary prevent a Tribunal granting the application. It does not operate as an absolute bar….. It is, however, as*

I said in the case of ***Argyll & Clyde Health Board v. Foulds & Others*** *UKEATS/0009*, a highly relevant factor……. *Underhill J referred to it as "potentially decisive" in* ***TGWU v. Safeway Stores Ltd*** *UKEAT/0092/07 at paragraph 10. Furthermore, a Tribunal requires to consider why the application was not made at an earlier date, why it is being made at that point in time and what are the whole circumstances of the lateness…….The overall task of balancing the injustice and hardship that will result from granting the amendment against that which will result from refusing it, must in the case of amendment to introduce a fresh claim which would be time barred if presented independently, be carried out in that context.*"

Harassment

16. The respondent's solicitor made the following submissions in relation to this proposed complaint:-

"*The same points raised above are relevant to the further new claim of harassment. Further, that amendment was sought at an even later stage and again, without clear explanation. The respondent would respectfully point to the following matters:*

a. *The Claimant has been professionally represented since August 2019 and yet seeks to make such an amendment over a year later.*
b. *There is no good reason why such matters were not pleaded in the first or second claim forms, or intimated at the preliminary hearing. They were not even added at the point that the victimisation claim was intimated through the May amendment.*
c. *This additional claim comprising some 12 acts of harassment is indicative of a scattered gun approach to this litigation and runs contrary to the overriding objective.*

Weighing such matters into the balance, and applying the ***Selkent*** *principles, these amendments ought to be refused. The Claimant will undoubtedly suggest that it is re-labelling and that such facts will need to be considered in any event, however, this is to miss the point entirely. Such claims must not be an afterthought or an 'add on'. There is a very specific definition in law. The Tribunal is specifically reminded of the words of Elias LJ in the case of* ***Land Registry****, where he focused on the words "intimidating, hostile, degrading, humiliating or offensive" and observed that:*

'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'

The amendments sought by the Claimant is to pick out various paragraphs of the narrative in a single label of harassment without any consideration of the true meaning of such discriminatory treatment. It plainly cheapens the significance of that definition."

Time-bar

17. The respondent's solicitor then went on to make submissions on time-bar and the jurisdiction of the Tribunal. He also made submissions with regard to the prospects of various complaints succeeding and submitted that they should be struck out as having, *"no reasonable prospect of success"*, in terms of Rule 37(1)(a) in Schedule 1 of the Rules of Procedure or that the claimant should be required to pay a deposit as a condition of being allowed to proceed with various complaints on the basis that they have, *"little reasonable prospect of success",* in terms of Rule 39.

18. He also submitted that the unfair dismissal complaint should be struck out as having no reasonable prospect of success.

19. These are matters which in my view cannot properly be considered and determined on "the papers". A preliminary hearing will be required.

20. I deal with this more fully below.

Claimant's conduct

21. Finally, the respondent's solicitor made the following submissions under this heading:-

"*The manner in which the Claimant has, through her representatives, sought to conduct proceedings thus far has been entirely unreasonable. Ignoring the unfortunate service of two claim forms at two different Tribunal centres, the claim of unfair dismissal could have been pleaded in the first claim in any event given notice of dismissal had been given. Instead, the Claimant lodged a fresh claim which did not simply include a claim for unfair dismissal only.*

Thereafter, there has been a continued and persistent attempt to expand the claims that this Tribunal has been asked to adjudicate on. There have been, on a fair reading, four so-called "bites at the cherry" if one includes the Claimant's list of issues which accompanied her Agenda for the preliminary hearing in March 2020. It seems likely there may even be further attempts to do so. To draw a line in November 2020, 11 months after the first claim was

submitted and over 13 months after the Claimant was given notice of her dismissal from the respondent, would be entirely unfair for the respondent. That line ought to have been firmly drawn once the second claim (which ought to have been an amendment only) was lodged, or at the very least by May 2020 by which time the Claimant had been ordered by the Tribunal to give proper consideration to her claims. We repeat that the Claimant's representative has been on record since August 2019.

Instead, the Claimant seems disposed to adding claims as they occur to her (or no doubt more rightly her advisors). This drives a coach and horses through the Tribunal's case management procedures. It runs contrary to the overriding objective, and in particular Rule 2(b) 'Dealing with cases in way that are proportionate to the complexity and importance of the issue.'

Further, in accordance with Rule 37(1)(b) the manner in which the proceedings have been conducted by or on behalf of the Claimant has been unreasonable. The Tribunal is therefore urged to strike-out those additional claims and amendments sought after lodging the first claim.

CLOSE

For all these reasons which can be amplified further at the preliminary hearing, and anticipating the Claimant does now seek to adopt a reasonable stance as to this ever expanding claim, the Respondent would respectfully request that a full day open preliminary hearing is listed forthwith."

Discussion and decision

22. In ***Cocking v. Sandhurst (Stationers) Ltd & Another*** [1974] ICR 650, Sir John Donaldson, when delivering the Judgment of the NRIC, laid down a general procedure for Tribunals to follow when deciding whether to allow substantial amendments. These guidelines have been approved in several subsequent cases and were re-stated in ***Selkent Co. Ltd v. Moore*** [1996] ICR 836. In that case, the EAT emphasised that the Tribunal, in determining whether to grant an application to amend, must carry out a careful balancing exercise of the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to parties by granting or refusing the amendment. Useful guidance on this issue was also given by the EAT in ***Argyll & Clyde Health Board v. Foulds & Others*** UKEATS/009/06/RN and ***Transport & General Workers' Union v. Safeway Stores Ltd*** UKEAT/0092/07/LA.

23. In both cases, the EAT referred, with approval, to the terms of paragraph 311.03 in section P1 of Harvey on Industrial Relations and Employment Law:-

"***(b) Altering Existing Claims and Making New Claims [311.03]***

A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action which is linked to, or arises out of the same facts as the original claim; and (iii) amendments which add or substitute a wholly or new cause of action which is not connected to the original at all."

24. Valuable guidance was also provided by Mummery LJ at pages 843 and 844 in ***Selkent***:-

"*……..*

(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of the amendment against the injustice and hardship of refusing it.

(5) What are the relevant circumstances? It is impossible and desirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment.

Applications to amend are of many different kinds ranging, on the one hand from the correction of clerical and typing errors, additions of factual details to existing allegations and the addition or substituting a further label for facts already pleaded to, to on the other hand, making of entirely new factual allegations which change the basis of the existing claims. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of 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 could be extended under the applicable statutory provisions e.g. in the case of unfair dismissal s.67 of the Employment Protection (Consolidation) Act 1978.

(c) The timing and the manner of the application

An application should not be refused wholly because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for

the making of amendments. The amendments may be made at any time, before, at, even after the hearing of the case. 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 and information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting amendments. Questions of delay, as a result of adjournment and additional costs particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

Present case

25. The application to amend to include the victimisation complaint was made in May 2020. The application to include the harassment complaint was made in November 2020. However, as the issues with which I was concerned were equally applicable to both complaints, I was able to deal with them together.

"Nature of the amendment"

26. The claimant has had the benefit of legal advice since August 2019. The claim form was submitted on 24 December 2019 by the claimant's solicitor. The particulars of the claim were very detailed indeed. Each of the discrimination complaints was set out under separate headings. They did not include complaints of victimisation and harassment.

27. I am bound to say, that I shared the concern of the respondent's solicitor, with reference to ***C v. D***, at the somewhat "narrative style" of the pleadings in the claim form which makes case management more difficult. It was my intention, therefore, at the case management preliminary hearings to give directions which would result in the pleadings being more concise and focused and I had hoped, having regard to the "overriding objective" in the Rules of Procedure, that this would save time and cost. However, thus far that has not been achieved and were I to grant the application to amend, the pleadings would be expanded.

28. I was also mindful throughout my deliberations of the following passage from the Judgment of the Honourable Mr Justice Langstaff in ***Chandhok v. Tirkey*** UKEAT/0190/14/KN:

"16……..The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made, meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."

Victimisation complaint

29. The victimisation complaint is to be found at paras. 86 and 87 of the proposed amended claim form. The application to amend to include this complaint was made in May 2020. The facts founded upon in support of this complaint are set out at paras. 86(1) and 86(2).

30. In my view, the submission by the respondent's solicitor that: "*this is a new cause of action entirely (with a different motive or reason for treatment now asserted)*", is well-founded.

Harassment complaint

31. The harassment complaint is to be found at paras. 88-90 inclusive. It does appear to be a "re-labelling exercise" as the facts relied upon to support the complaint at para. 88 are those already averred. However, the reference to several acts of harassment (12 according to the respondent's solicitor) and the manner in which the claimant's solicitor has gone about framing the pleadings in this case does suggest something of a "scatter gun approach",

as the respondent's solicitor submitted. It also appeared to me that the proposed introduction of these two further complaints was something of an afterthought, especially as the claim form was so detailed and clearly considerable thought had been given to the complaints to be advanced, at that time.

"The applicability of time limits"

32. There are time limit issues in respect of both complaints. I am unable, on the basis of the information before me, and without hearing evidence from the claimant, to decide whether it would be just and equitable to extend the time limit. However, material factors in that regard will be that the claimant has had the benefit of legal advice since August 2019; there does not appear to be any impediment to the complaints of victimisation and harassment being submitted in time; no explanation, has been given as to why they were not included in the detailed claim form; no explanation has been given as to why the amendment was not sought sooner.

33. However, for the purposes of considering an application to amend, time bar is not determinative. As Mummery LJ said in ***Selkent***, it is but a factor to be considered, in the round, albeit an important one.

"The timing and manner of the application and the balance of prejudice and hardship"

34. As I recorded above, there was no explanation for the delay and the claimant has had the benefit of legal representation for some considerable time. While I was mindful that at the case management preliminary hearing on 23 March the case was sisted due to the Covid-19 pandemic, in para. 14 of my Note I encouraged the parties to continue to liaise and there was no reason, therefore, why the claimant could not have submitted the proposed amendment application earlier.

35. While the harassment complaint relies on existing factual averments, there are time bar issues in relation to each of the complaints which will require to be addressed and this will involve delay and additional expense. There are also other preliminary issues which will require to be considered and determined. This will take time and were I to allow the amendment further delay may impact upon the cogency of the evidence which is already a concern with the passage of time.

36. So far as the balance of hardship/prejudice is concerned, were I to allow the amendment, there would be further delay and expense. However, were I to refuse the amendment, the claimant would still be able to pursue the numerous complaints already advanced.

37. I was also mindful of the guidance of Lady Smith in ***Newsquest***, to which I was referred by the respondent's solicitor, that: "*a Tribunal requires to consider why the application was not made at an earlier date, why it is being made at that point in time and what are the whole circumstances of the lateness.*"

38. While my decision was a narrow one, I am of the view that the balance of prejudice/hardship favours the respondent.

39. For all these reasons, therefore, I arrived at the view that the claimant's application to amend should be refused. In my view, considering all the factors, in the round, it is not in the interests of justice, nor in accordance with the "overriding objective" in the Rules of Procedure, to grant the application.

Further procedures

40. As I recorded above, the respondent's solicitor has raised a number of preliminary issues in relation, not only to time bar, but also the prospects of the various complaints comprising the claim succeeding. I am of the view, having regard to the "overriding objective" in the Rules of Procedure and the interests of justice, that it will be necessary to fix a one day open preliminary hearing to consider and determine these issues. **I direct, therefore, that a case management preliminary hearing by telephone be fixed without delay to consider the following:-**

(i) the issues for the preliminary hearing;
(ii) fixing a date for the preliminary hearing;
(iii) the manner in which the hearing will be conducted – either "in-person" or by Video Conference using the "Cloud Video Platform" ("CVP");
(iv) directions and Orders;
(v) any other relevant matters.

Employment Judge N M Hosie

Dated: 29th January 2021

Date sent to parties: 29th January 2021