EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
Mrs D Dawson	More 4x4 Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A PRELIMINARY HEARING

HELD AT Bristol **ON** 18th March 2021

EMPLOYMENT JUDGE A Richardson

Representation
For the Claimant: Mr J Bromige, Counsel
For the Respondent: Mr R Johns, Counsel

JUDGMENT

The judgment of the Tribunal is that

(1) The Claimant's claim no. 1401026/2020 is allowed under Rule 12 (2A) as it is not in the public interest to reject the claim for a minor error.

(2) The Claimant's application to amend her claims to include a claim under S26 Equality Act 2010 for race related harassment is refused.

REASONS

1. The issues to be determined were:
    a. Should the claimant's claim no. 1401026/2020 be rejected under Rule 121)(f) ETs (Constitutional & Rules of Procedure) Regs 2013 Sch. 1?
    b. If not, should the Claimant be permitted to amend her claim under case number 1403824/2020 to include the claim pleaded in case number 1401026/2020?
    c. Should the Claimant be permitted to amend her claims to include a claim under S26 EqA 2010 of racial harassment?

Proceedings and Evidence

2. The hearing was conducted by the parties attending in by video conference (CVP). It was held in public with the Judge sitting in open court in

accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not desirable in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 and the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, as amended, and because it was in accordance with the overriding objective to do so.

3. I was provided with a bundle of 181 pages, a disputed bundle of some six pages which were not referred to; indexes for both bundles and correspondence from the parties regarding an application to amend and objections to the application.

4. I heard oral submissions from both parties' representatives.

5. Following an oral decision on a preliminary issue earlier in the afternoon, there remained insufficient time to give an oral decision on the issues listed above and it was agreed that the decision would be reserved.

6. The decision in respect of each of the issues is as follows:

Rule 12 Rejection: substantive defects

(1)the staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be –

(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.

[2A)The claim or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind descried in paragraph……..(f) of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to the name or address and it would not be in the interests of justice to reject the claim.

7. The facts are that the Claimant filed her first claim form on 5th February 2020 giving at box 2.1 the name of her employer or the person or organisation she was claiming against, as Mrs Patricia Goring, a director of the respondent company and the claimant's line manager. The address for Mrs Goring was entered in box 2.2 as "More4x4 Limited at Dean Farm etc. etc." The grounds of complaint address Mrs Goring's conduct and refer to her as "you".

8. The ACAS Early Conciliation certificate dated 12th February 2020 stated the prospective respondent as More4x4 Limited at the same address as that given in box 2.2 of the ET1.

9. The Tribunal administration did not reject the claim and served it on the respondent company at the given address in box 2.2 for Mrs Goring and respondent company. The Respondent, at that time unrepresented, did not refer

in its grounds of resistance to the anomaly between the claim form and the ACAS Early Conciliation Certificate. The second claim filed by the Claimant was consolidated with the first claim on 3rd September 2020 by the Tribunal following representations from both parties and no reference was made to the anomaly. The Respondent's response to the second claim was again drafted by Mrs Goring without legal representation. The anomaly was not raised by the Respondent as an issue at the case management hearing on 20th October 2020 when they were legally represented.

10. The Respondent submits now at this preliminary hearing that the Tribunal's discretion at subparagraph (f) is not appropriate because the error was not a minor error: the grounds of complaint are clearly against Mrs Goring personally and not the company; and that was the intention of the claimant – it was not a minor error.

11. The Claimant has referred in Box 2 of the ET1 form to Mrs Goring and the Respondent company. This is not an infrequent occurrence when litigants in person complete the ET1 without professional legal representation that an individual manager is named as the respondent as well as the company. The Tribunal recognised the correct respondent as the Respondent Company and served the ET1 accordingly.

12. Mrs Goring in completing the Respondent's response form completed the Respondent's details, entering More4x4 Limited as the Respondent. Mrs Goring was clearly not misled.

13. The claim in the first ET1 was repeated at paragraphs 12 and 13 in the grounds of complaint of the second complaint form. The Respondent was not prejudiced by the discrepancy between the name on the Early Conciliation Certificate in the first claim form; the Respondent company knew who the correct Respondent was for the reason at paragraph 12 above, and it has not been prejudiced in any way by the claimant's error.

14. In the circumstances, I find the reference to Mrs Goring being the Respondent in the first Claim form was a minor error and given that there has been no adverse consequences of the mistake in the progress of these proceedings in terms of identity of the correct respondent or the ability of the Respondent to adequately respond, it would not be in the interests of justice to reject the claim. The claim is allowed to proceed.

15. The amendment application to amend the second claim to include the grounds of complaint in first claim falls away.

Amendment to include a claim under S26 racial harassment

16. On 17th March 2021, the day before this hearing, the Claimant made an application to amend her clam to include one of harassment on the ground of race. The complaint relates to the allegation that Mrs Goring made a comment to the Claimant and her daughter that the Claimant looked like a gypsy fortune teller

as a result of the headscarf she was wearing to cover her hair loss arising from post sepsis syndrome.

17. The Claimant contended that in so doing, the Respondent had engaged in unwanted conduct related to race (Romany gypsy) which violated the Claimant's dignity and which created a degrading, humiliating and offensive environment for her.

18. The Claimant has already pleaded that the same facts amounted to disability related harassment under S26 EqA 2010.

19. The Claimant submitted that the amendment is merely a relabelling; that it would be in accordance with the overriding objective in assisting the tribunal to deal with the proceedings efficiently and fairly, because all the parties would be clearer on the nature of the complaints.

20. Mr Bromige additionally submitted that there is no time limit issue because the Claimant is not bringing in a new cause of action or a new allegation. The Respondent is not prejudiced because they have always known of the allegation and they say that no reference was made to head scarves which is a denial in respect of headscarves but not a denial of a reference to 'Gypsy'. The Respondent accepts a reference to telling fortunes – therefore a reference can be drawn to Gypsy. The Respondent is not in material difficulty. It is nothing more than a relabelling exercise. Even though it is accepted it could have been brought earlier, there is no prejudice to the Respondent. The balance of prejudice and hardship falls in favour of the Claimant and should be allowed.

21. The Respondent objected to the application on the following grounds:
    a. The application is not simply a relabelling although it is accepted that the application incident is referred to in the second ET1 - looking like a fortune teller owing to the head scarf. The Claimant has pleaded the alleged facts as a harassment claim related to disability.
    b. The Claimant has changed her claim conceptually to harassment on the grounds of race.
    c. It is not acceptable for the Claimant to say she found the environment to be hostile or degrading and then to apply the comment to any different number of protected characteristics. She alleged that the environment was hostile and degrading because of her disability – it is a sea change to say it was a hostile environment because of race.
    d. The Claimant has been represented for 8 months and has attended already one case management hearing. The application is made on the eve of the second case management hearing.
    e. This is not a simple relabelling; it a completely different way of looking at and interpreting the alleged comment.
    f. The balance of prejudice falls in favour of the Respondent.

22. I have regard to the **Selkent** principles and **Vaughan v Modality**

Partnership UKEAT/0147/20/BA.

23. In **Modality** HHJ J Tayler repeated the key test in **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650 at 657B-C**:1 as

"In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."

24. He stated that no consideration of an application for amendment is complete with a reference to Selkent at paragraph 844B:

"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 allowing the amendment against the injustice and hardship of refusing it."

25. The Selkent factors are: the nature of the amendment, applicability of time limits and the timing and manner of the application. These factors are to be considered in the overall context of balancing the injustice and hardship of refusing or allowing the amendment.

26. Being guided by the above leading authorities, I find that this is not a relabelling exercise as it relies on a completely new, different protected characteristic. The entirety of the Claimant's case apart from this late application is based on disability, not race.

27. The application is made very late. It is made some 12 months after the first claim was filed and some 9 months after the second claim was filed. It was made on the eve of a second case management hearing some 8 months after the Claimant was legally represented. There was no evidence as to why the application to amend was not made earlier; the Claimant certainly could not have assisted the Tribunal as I think it highly unlikely she would have considered at the time that she was harassed because of a comment which could possibly be interpreted as a negative comment about Romany Gypsies rather than because of her disabilities.

28. The claim, if it were allowed and succeeded because the alleged facts were established, would make little difference to the Claimant's overall success of her claim on the basis of her disability and her claim for disability related harassment on the same facts. Essentially it would make little if any difference to compensation if the Claimant is successful. There would however prejudice to the Respondent in defending a claim brought so late, without explanation or reason, in that it must amend its response incurring additional time and expense and deal with it as an additional item in both the witness statement and cross examination. I accept that the costs and time would not be hugely significant, but the advantage to the claimant of allowing the claim is also not significant in that she has already a live claim of disability related harassment on the same facts.

Race related harassment on the same facts contributes nothing of significance to the pleaded case.

29. In the circumstances the Claimant's application to amend is very late, it is not a claim which, if refused, would leave the Claimant disadvantaged in her substantive claim. It seems to me the application was made just because it could be made and had not been 'spotted' earlier, without any valuation of its contribution to the Claimant's main claim as against the lateness of making the claim and the prejudice to the Respondent. Weighing the injustice and hardship of allowing or refusing the application, I find the balance falls in favour of the Respondent and the application is refused.

Employment Judge A Richardson
Date: 19March 2021

Judgment & Reasons sent to the Parties: 23 March 2021

FOR THE TRIBUNAL OFFICE