EMPLOYMENT TRIBUNALS

Claimants **Respondent**

Ms Kellam & Ms Woodun **v** 11 Health & Technologies Limited

Heard at: Watford via telephone **On**: 12 March 2021

Before: Employment Judge Bartlett

Appearances

For the Claimant: Mr Megha (for Ms Woodun) Ms Leaver (for Ms Kellam)
For the Respondent: Mr Singer

PRELIMINARY HEARING JUDGMENT

1. The claims are consolidated.

2. Ms Woodun's application to amend her claim in respect of race discrimination is refused.

3. Ms Kellam's application to amend her claim in respect of victimisation is rejected.

4. Ms Kellam's application to amend her claim in respect of associative discrimination relating to disability is granted.

5. Ms Kellam's application for further and better particulars is rejected.

6. Ms Kellam's application for specific disclosure is rejected.

REASONS

Background

1.1 This Judgement sets out Employment Judge Bartlett's decision at the preliminary hearing which took place on 12 March 2021 on the applications to amend that had been received from the claimants.

1.2 Both claimants made applications to amend their claim however regrettably neither of them had identified in advance of the hearing the detail of the amendment they sought. In particular they both struggled to set out the parts of their claim such as if it was direct discrimination what the unfavourable treatment was and who the comparator was, similar issues were faced with indirect discrimination claims and the claims of victimisation.

Consolidation

1.3 The respondent requested that the claims of Ms Woodun and Ms Kellam were consolidated. Ms Woodun agreed but Ms Kellam objected on the fact that there were no common issues of fact or law in the claims.

1.4 After considering rule 36 I decided to consolidate the claims for the following reasons:

1.4.1 both claims arise out of a similar factual matrix which is the alleged redundancy exercise as a result of which both claimants were dismissed. I recognise that each claimant has a different basis on which they challenged the legality of their dismissal however there will be common issues of fact particularly on the respondent's part;

1.4.2 it is reasonable to expect that the respondent would produce similar evidence in relation to the alleged redundancy in both claims;

1.4.3 it would not be an effective use of the respondents or the tribunal resources for the claims to be heard separately because of the potential duplication of substantial parts of the evidence and issues;

1.4.4 overall I considered it to be in the interests of the overriding objective consolidate the claims.

Applications to amend

Ms Woodun's application to amend her claim to include race discrimination claim

1.5 Mr Megha identified the claimant's application to be the issue that Ms Woodun should have been given the opportunity in October 2019 to take a role in the USA instead of making her redundant.

1.6 I asked Mr Megha what sort of discrimination claim this was for example was it a direct discrimination claim or an indirect discrimination claim. Mr Megha stated that it was an indirect discrimination claim but when I asked him repeatedly what the provision practice or criterion was he was unable to identify it. What he tried to identify as the PCP could not be a PCP.

1.7 As Mr Megha was unable to clarify what amendment he was seeking I refused the application.

Ms Kellam's application to amend her claim to include a claim of associated discrimination on the basis of disability and victimisation

1.8 A very considerable proportion of this hearing was spent trying to identify clearly what amendment was sought. This is most unsatisfactory. Ms Kellam made an application to amend months ago, the notice of hearing was sent out months ago: I would expect an application to provide the basic information necessary for the application to be considered.

Victimisation

1.9 I asked Ms Leaver to identify the protected act and the detriment. She identified the protected act as the submission of the ET1 on 15 March 2020. She then identified the detriment as an email from Bernhard Gilbey to Oliver Braunwalder on 15 January 2020. The claimant became aware of this email on 30 March 2020 as a result of disclosures under a data subject access request.

1.10 It was pointed out to Ms Leaver that the alleged detriment predated the protected act and therefore this could not possibly sustain a victimisation claim. Ms Leaver then stated that the protected act was the claimant's appeal against her dismissal.

1.11 I considered rule 36 and the relevant case law including but not limited to **Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT** which reminds us that the tribunal must have regard to all the circumstances and in particular to any injustice or hardship which would result from the amendment or a refusal to make it.

1.12 I decided to refuse the application for the following reasons:

1.12.1 this is an entirely new cause of action and cannot be considered a re-branding of existing claims;

1.12.2 as a new cause of action it would require the respondent to provide evidence on this issue as well as all the other issues in the case. It would expand the issues in the case and as such it would impose on the respondent the expenditure of further time and expense;

1.12.3 not to allow the amendment would prevent Ms Kellam from bringing a victimisation claim;

1.12.4 Ms Leaver made the application to amend within 3 months of becoming aware of the facts involved. Even though the claim is

prima facie out of time this would be a strong factor in deciding that it was just and equitable to extend time;

1.12.5 Ms Leaver struggled to define the claim. In particular she identified one protected act and when it was pointed out that the claim was untenable on that basis she changed her mind and set out a different protected act. I feel that this has some relevance of the importance of the victimisation claim to Ms Kellam;

1.12.6 the tribunal must be careful not to place too much weight on the merits of the claim. However on the limited information available to me it would appear that this claim would have little or no reasonable prospects of success because of the difficulties in establishing that the detriment is a detriment in the legal sense under section 27 of the Equality Act 2010. This is because the email complained of was providing information on the respondent's position to another individual in the respondent only.

Associative disability discrimination

1.13 Again considerable amount of time was spent trying to determine the terms of the amendment sought. In particular time was spent trying to identify whether it was a claim of direct discrimination or indirect discrimination and what the relevant parts of those potential claims were. In the end and after considerable time and some difficulties it was put that it was a claim of **direct discrimination relying on a hypothetical comparator. The less favourable treatment was the decision by the respondent (arising from a statement of Mr Michael Seres) that the claimant would not be able to move to the US due to her caregiving responsibilities and the decision, contrary to previous practice, that an individual taking a post in the US would have to pay visa costs in the amount of approximately £8k.**

1.14 Ms Leaver stated that the policy re visas was changed on 29 October 2019 and Ms Kellam became aware of it around the end of November 2020. In relation to the statement by Mr Seres the claimant only became aware of this on 31 March 2020 and was not out of time. She accepted that this was not relabelling and was a new cause of action.

1.15 Mr Singer objected to the application. He found the amendment unclear. If Ms Kellam knew of the policy change in November 2020 that part of the claim is out of time in addition the rest of the claim is out of time. The amendment is not a relabelling exercise instead it is a new cause of action which is out of time. It will add cost and length to the hearing. Further there is prejudice to the respondent because Mr Seres has sadly passed away and will not be able to provide evidence or context to his comments.

1.16 As set out above I had due regard to rule 36 and the relevant case law including but not limited to **Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT.**

1.17 I decided to allow the amendment for the following reasons:

1.17.1 It will not involve substantial prejudice to the respondent because the circumstances surrounding Ms Kellam's dismissal and the issue about the US role are relevant to the other claims in this case. Therefore, the respondent would be required to provide evidence related to these circumstances in any event;

1.17.2 Ms Kellam only became aware of the comments by Mr Seres on 31 March 2020 and she submitted the application within three months of that date. Therefore though her claims are technically out of time I consider that it is just and equitable to extend time in these circumstances.

Other applications – Ms Kellam's applications for specific disclosure and further and better particulars from the respondent

1.1 Ms Leaver on behalf of Ms Kellam made an application for specific disclosure of payslips stating that the respondent had only disclosed payslips for the last year of employment. I refused to grant this application given that I was not able to identify that these had any relevance to the claim. Ms Kellam does not dispute that she received a pay rise in the years 2015, 2016, 2017 2018. I would expect her to have her own financial records of her pay if she needed them. I cannot see how these are relevant to the calculation of her schedule of loss or breach of contract claim which relates to 2019 only.

1.2 Ms Leaver made an application for an order for further and better particulars from the respondent in relation to 2 points. I declined to make an order as I was not satisfied that the issues were relevant and/or could not be dealt with through standard disclosure. Mr Singer indicated that this could be dealt with through correspondence.

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Employment Judge Bartlett

Date: 17 March 2021
6 April 2021
Sent to the parties on: .....

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For the Tribunal Office