



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4107706/2019 & 4114451/2019

Held to Glasgow on 27 and 28 January 2021

Employment Judge: M Sutherland (sitting alone)

5 **Ms L Walsh**

Claimant

10 **Inco Marketing Limited (in Liquidation)**

First Respondent

15 **Neil Duncan Grant Ritchie**

Second Respondent

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Colin Abercrombie

Third Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that –

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- the application to amend to include allegations 1 to 9 and 11 of direct discrimination against the Third Respondent is refused.
 - the application to amend to include allegations 1 to 3 and 5 of indirect discrimination against the Third Respondent is refused.
 - the application to amend to include allegations 1, 3, 4, 5 and 7 of harassment
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- against the Third Respondent is refused.

- the application to amend to include allegations 1, 2, 4 and 5 of victimisation against the Third Respondent is refused.
- the application to amend to include allegations 1 to 9 and 11 of discrimination arising from disability against the Third Respondent is refused.
- 5 - the application to amend to include allegations 1 to 3 and 5 of failures to make reasonable adjustment against the Third Respondent is refused.

Introduction

1. An open preliminary hearing was arranged for today in chambers to determine on the basis of the parties' written submissions the Claimant's application to
10 amend to the extent it was objected to by the Third Respondent.

Background

2. On 12 July 2019 the Claimant lodged a tribunal claim (4107706/2019) (**the first claim**) against the First and Second Respondents raising complaints of direct disability discrimination, discrimination arising from disability, indirect
15 disability discrimination, harassment related to disability and victimisation (the paper apart extended to 7 pages of unnumbered paragraphs).
3. On 13 Dec 2019 the Claimant lodged a tribunal claim (4114451/2019) (**the second claim**) against the First, Second and the Third Respondents raising complaints of constructive dismissal, breach of contract, direct disability
20 discrimination, discrimination arising from disability, failure to make reasonable adjustments, indirect disability discrimination, harassment related to disability and victimisation (the paper apart extended to 10 pages of unnumbered paragraphs). The paper apart in the second claim referred to and included the paper apart from the first claim (page 1 "I refer to my
25 averments in my existing claim which are copied at the foot of this document" and page 3 "I also make the following additional claims against the First, Second and Third Respondents arising from the facts leading up to my resignation").
4. The Claimant sought for the first and second claims to be heard together. On
30 5 Feb 2020 the Third Respondent objected on the following grounds: "...it

would not be appropriate to conjoin the actions. From the repetition of the Claimant's first action claims in the second action it appears that she may be seeking to direct all of those claims against Mr Abercrombie (Third Respondent) as well. If so, a number of those claims would be time barred. In all the circumstances the Claimant's application to conjoin actions is opposed."

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5. On 24 February 2020 a winding up order was granted putting the First Respondent into liquidation.

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6. A Case Management Preliminary Hearing was held on 29 April 2020, at which the Claimant was required to provide a document setting out key facts and specific legal claims arising.

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7. On 29 May 2020 the Claimant lodged a single document combining the paper apart from the first claim with the paper apart from the second claim into a single document and in addition provided 10 new pages (pages 10 to 19) specifying claims of direct disability discrimination, indirect disability discrimination, harassment, victimisation, discrimination arising from disability, and failure to make reasonable adjustments ('**the V1 averments**'). (The V1 averments extended to 19 pages.)

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8. Following application of the Claimant on 29 May 2020, the case was sisted pending the Sheriff Court granting permission to proceed against the First Respondent.

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9. A Case Management Preliminary Hearing was held on 24 November 2020 at which the Claimant was required to identify the *Madarassy* factors upon which direct discrimination could be inferred, the protected act for the purposes of the victimisation claim, and the unfavourable treatment for the discrimination arising from disability claim.

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10. On 1 December 2020 the Claimant further expanded upon combined claim by providing what she described as further specification of the protected act (page 15) and the unfavourable treatment (page 17) ('**the V2 averments**'). (The V2 averments extended to 20 pages.)

11. On 8 December the Third Respondent highlighted in the V1 averments (i.e. not V2 averments) the new claims directed against her which could only proceed by amendment.
12. On 11 January 2021 the Claimant further expanded upon the combined claim by providing what she described as further specification of claims including the *Madarassy* factors (pages 10 to 14), and specifying an alternative ‘pcp’ and an additional disadvantage (page 15) (**V3 averments**). (The V3 averments extended to 23 pages.)
13. On 11 January 2021 the Claimant lodged written submissions regarding the application to amend.
14. On 18 January 2021 the Third Respondent lodged written submissions regarding the application to amend.
15. On 21 and 22 January 2021 the Claimant made supplementary written submissions regarding the application to amend.
16. On the application of the Claimant which was consented to by the Third Respondent the hearing on the application to amend was heard today in chambers on the basis of parties’ written submissions.

The law

17. The Tribunal has a broad discretion under Rule 29 to allow amendments at any stage of the proceedings either on its own initiative or on the application by a party.
18. The EAT in *Selkent Bus Company Ltd v Moore* [1996] IRLR 6 provided the following guidance on amendment: *“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”*.
19. That discretion should be exercised in a way that is consistent with the requirements of “relevance, reason, justice and fairness inherent in all judicial decisions”.

20. That discretion also should be exercised in accordance with the overriding objective of dealing with cases fairly and justly including, so far as practicable (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.
21. The following non-exhaustive factors are relevant to the exercise of that discretion: the nature of the amendment; the applicability of any time limits; the timing and manner of the application; and all the circumstances including prospects of success.

The nature of the amendment

22. *“Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels of facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of a minor matter or is a substantial alteration pleading a new cause of action” (Selkent).*
23. There are broadly three types of amendment: amendments which add to or alter the basis of an existing claim or defence (“minor”); amendments which add or substitute a new cause of action or defence arising out of facts already plead (“re-labelling”); and amendments which add or substitute a wholly new cause of action (“substantial”).
24. The Court of Appeal in *Abercrombie & Others v Aga Rangemaster Ltd [2013] EWCA Civ 1148; [2013] IRLR 953* provided: “the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been 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 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”.

The applicability of time limits

25. *“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 the complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions” (Selkent)*

26. The applicable time limits do not ordinarily affect minor amendments or re-labelling exercises. For substantial amendments the tribunal should consider whether the complaint is out of time and if so whether the time limit should be extended. This is only a factor and not wholly determinative.

27. Rule 34 specifically provides that the tribunal may, on its own initiative, or on the application of a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings and may remove any party apparently wrongly included. If the amendment seeks to add a respondent to a complaint which was not presented timeously the tribunal have no discretion to do so. If the amendment seeks to add a respondent to a complaint which was presented timeously the tribunal have a discretion as to whether to do so. Such discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly under Rule 2 and in accordance with the EAT guidance in Selkent but the time limits do not apply (*Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650 (NIRC))

25 The timing and manner of the application

28. *“An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules 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 or new information appearing from documents disclosed in discovery. Whenever taking any factors into account, paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.” (Selkent)

29. Consideration should be given to the effect of any delay on the quality of evidence, additional areas of enquiry, and the stage of the tribunal proceedings.

10 All the circumstances

30. *“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” (Selkent).*

15 31. The tribunal should take into account all the circumstances including prospects of success.

The Claimant’s submissions

32. The Claimant’s submissions were in summary as follows –

20 a. By email of 5 February 2020 the Third Respondent conceded that the Claimant by virtue of the second claim was seeking to direct the first claim against the Third Respondent.

b. The first claim cannot be time barred against the Third Respondent having been raised timeously against the First and Second Respondent.

25 c. There has been no unreasonable delay in progressing matters – any delay arose because of the liquidation of the First Respondent and general covid-19 issues neither of which are in the Claimant’s control.

d. The prejudice to the Claimant of refusing the amendment far exceeds the prejudice to the Respondent if it is allowed. If refused she has

effectively lost the ability to enforce against the First Respondent which is in liquidation. The liquidator has indicated that there are unlikely to be any funds to pay creditors. If the amendment is allowed the Third Respondent would still be able defend the claims.

- 5 e. No delay will be caused by the amendment and the claims are at an early procedural stage because no final hearing has been listed.
- f. Little additional cost will be incurred because the Third Respondent remains in any event a party to the proceedings and key witnesses to these events.
- 10 g. Where it states that the Second Respondent carried out an act and “all Respondents are potentially responsible” this is because the Claimant suspects that the Second and Third Respondent jointly decided upon the course of action.
- 15 h. The Claimant held off raising the complaints against the Third Respondent because he was handling her grievance and her concerns regarding the Third Respondent increased as a result of his handling of that process.
- i. The V1 averments seek to add the Third Respondent as an additional respondent to existing claims.
- 20 j. The V2 and V3 averments provide further specification of existing claims or a re-labelling of existing facts.
- k. Allowing the amendment will not extend the evidence to be heard because it will be heard in relation to the Claimant against the First and Second Respondents anyway.

25 **The Third Respondent’s submissions**

33. The Third Respondent’s submissions were in summary as follows –

- a. The Selkent factors are not exhaustive and nor should they be approached in a tick box fashion.

- 5 b. “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.” (EAT, *Chandhok v Tirkey UKEAT/0190/14/KN*)
- c. The amendment involves the addition of new factual allegations against the third respondent which were in existence when the Claimant raised her first claim.
- 10 d. The first claim could have been directed against the third respondent, the Claimant was aware of her right to direct claims against an individual (having proceeded against the Second Respondent) but the Claimant elected not to do so in respect of the Third Respondent.
- 15 e. The Claimant “made a deliberate decision it not to seek to make these earlier allegations against the third respondent when she submitted her second claim”
- f. The fact that the third respondent is named in the first claim does not amount to making a claim against her and is not fair notice of such a claim.
- 20 g. The fact that the second claim states “I refer to my averments in my existing claim” does not make clear that she is pursuing claims for discrimination against the Third Respondent in relation to issues that arose prior to the grievance being submitted.
- 25 h. The fact that the second claim states “I also make the following additional claims against the First, Second and Third Respondents arising from the facts leading up to my resignation” is insufficient notice of the specific claims being pursued in respect of which events.
- i. Any amendments pertaining to less favourable treatment regarding the handling of grievance and other matters from 31 May 2019 onwards are not opposed.

- j. The amendments do not set out a statable claim without further specification either at all or against the Third Respondent.

Decision

Combining of the first and the second claims

5 34. The paper apart in the second claim referenced and included the paper apart from the first claim. Page 1 of the second claim: "I refer to my averments in my existing claim which are copied at the foot of this document." Page 3 of the second claim: "I also make the following additional claims against the First, Second and Third Respondents arising from the facts leading up to my
10 resignation" - "Third Respondent: direct disability discrimination; unfavourable treatment because of things arising as a consequence of my disability; indirect disability discrimination and failure to make reasonable adjustments (insisting on having EmployEasily involved in the grievance when the Respondents had been told it would cause me more stress and therefore harm); victimisation
15 due to having raised disability discrimination issues myself and through my solicitors (who wrote to the First and Second Respondent on 12 April 2019); harassment related to my disability" which sentence is then immediately followed by the paper apart from the first claim.

20 35. Contrary to the Third Respondent's submission the Claimant did make clear that she was pursuing claims for discrimination against the third respondent in relation to issues that rose prior to the grievance being submitted. This was recognised by the Third Respondent on 5 Feb 2020 where she stated
*"From the repetition of the Claimant's first action claims in the second action it appears that she may be seeking to direct all of those claims against Mr
25 Abercrombie (Third Respondent) as well. If so, a number of those claims would be time barred. In all the circumstances the Claimant's application to conjoin actions is opposed."* Accordingly, that part of the combined claim which simply combines the first and second claims (pages 1 to 10) does not of itself amount to an amendment.

30 The expanded combined claims

36. The amendment application relates to three different sets of averments –

- a. **V1 averments** on 29 May 2020 (pages 10 to 19) specifying less favourable treatment for direct disability discrimination, indirect disability discrimination, harassment, victimisation, and failure to make reasonable adjustments.
- 5 b. **V2 averments** on 1 December 2020 which expand upon the V1 averments by specifying the protected act in respect of victimisation (page 15) and the unfavourable treatment in respect of discrimination arising (page 17).
- c. **V3 averments** on 11 January 2021 which expand upon the V1 and V2
10 averments by specifying the Madarassy factors in respect of direct disability discrimination (pages 10 to 14) and specifying an alternative pcp and an additional disadvantage (page 15).

Direct Disability Discrimination

- 15 37. The Third Respondent opposes the Claimant's amendment seeking to include allegations 1 to 9 and 11 of less favourable treatment because of disability (included in V1 averments onwards). The Third Respondent does not oppose the Claimant's amendment seeking to include allegations 12 to 31 of less favourable treatment because of disability.

The nature of the amendment

- 20 38. The amendment does not seek to add the Third Respondent as a party to the complaints in first claim. Firstly the Third Respondent is already a party to the complaints in the first claim by virtue of those complaints having been incorporated into the second claim which was raised against the Third Respondent. Secondly the amendment pertains to allegations 1 to 9 and 11
25 of less favourable treatment which were not contained in the first or second claim but are instead new complaints set out in the V1 averments. The amendment is not further specification of complaints which have already been made against the Third Respondent.
- 30 39. Further allegations 1 to 9 and 11 of less favourable treatment by the Third Respondent were not heralded in the first or second claim (prior to the V1

avements) and the amendment is not a re-labelling of facts which have already been stated.

The applicability of the time limits

40. Allegations 1 to 9 and 11 are said to have arisen in January, February or
5 March 2019 and to the extent that they are asserted to be continuing acts are understood to have ceased at the latest with the Claimant's resignation in September 2019. These allegations were intimated in May 2020, some 8 months after the Claimant's resignation. These allegations are on the face of it out of time and no explanation has been provided for that delay other than
10 the liquidation of the First Respondent and general COVID-19 issues (both arising February 2020) and neither of which therefore explain why these allegations were not made in the 5 month period from September 2019 to February 2020.

The timing and manner of the application

15 41. The Claimant has advised that she did not make the allegations against the Third Respondent because there were ongoing grievance proceedings but the issues she raises with her grievance arose prior to October 2019. This does not therefore explain why she did not include allegation 1 to 9 and 11 in her claim against the Third Respondent lodged December 2019. The
20 application is made now because the first Respondent is in liquidation.

42. The proceedings have been ongoing since July 2019 when the first claim was lodged. At the Case Management Hearing in November 2020 it was noted that a final hearing in respect of both claims was due to take place by CVP in March, April or May 2021. The effect of the amendment would necessitate
25 additional areas of inquiry regarding the involvement of the Third Respondent in the allegations and result in a process of further specification by the Claimant and adjustment by the Third Respondent in respect of matters arising prior to May 2019 (some 20 months ago). The effect of the amendment would be to add to Third Respondent's costs and is likely to delay this matter
30 reaching a final hearing.

All the circumstances

43. The tribunal should take into account all the circumstances including prospects of success of the amended claim if allowed.
44. The allegations are lacking in specification as regards the Third Respondent. The allegations make some specific allegations against the Second Respondent but do not make any specific allegations against the Third Respondent (they do not specify acts or deliberate failures to act by the Third Respondent). Allegations 1 to 9 and 11 do not contain the necessary factual elements of stateable claims against the Third Respondent and accordingly have no reasonable prospects of success.
45. Allegations 1 to 9 and 11 are also made against the Second Respondent and accordingly the Claimant is not without remedy if the First Respondent is without funds.
46. Balancing the injustice to the Claimant who will be denied a claim for direct disability discrimination against the Third Respondent in respect of the period prior to 31 May 2019 if the application is refused, against the injustice to the Third Respondent in defending such a claim if the application is granted, and taking into account all the circumstances including the substantial nature of the amendment, the effect of the significant delay in making the application to amend, the absence of stateable claims, the application to amend to include allegations 1 to 9 and 11 of direct discrimination against the Third Respondent is refused.

Indirect Disability Discrimination

47. The Third Respondent opposes the Claimant's amendment seeking to include allegations 1 to 3 and 5 of indirect discrimination (included from the V1 and V5 averments). The Third Respondent does not oppose the Claimant's amendment seeking to include allegation 4 of indirect disability discrimination.

The nature of the amendment

48. The amendment does not seek to add the Third Respondent as a party to the complaints in first claim. Firstly the Third Respondent is already a party to the complaints in the first claim by virtue of those complaints having been

incorporated into the second claim which was raised against the Third Respondent. Secondly the amendment pertains to allegations 1 to 3 and 5 of indirect discrimination which were not contained in the first or second claim but are instead new complaints set out in the V1 averments. The amendment is not further specification of complaints which have already been made against the Third Respondent.

49. Further allegations 1 to 3 and 5 of indirect discrimination by the Third Respondent were not heralded in the first or second claim (prior to the V1 and V5 averments) and the amendment is not a re-labelling of facts which have already been stated.

The applicability of the time limits

50. Allegations 1 to 3 and 5 are said to have arisen in February or June 2019 onwards and to the extent that they are asserted to have been continuously applied are understood to have ceased at the latest with the Claimant's resignation in September 2019. Allegations 1 to 3 were intimated in May 2020, some 8 months after the Claimant's resignation. Allegation 5 was intimated in January 2021, some 16 months after the Claimant's resignation. These allegations are on the face of it out of time and no explanation has been provided for that delay other than the liquidation of the First Respondent and general COVID issues (both arising February 2020) and neither of which therefore explain why these allegations were not made in the 5 month period from September 2019 to February 2020.

The timing and manner of the application

51. The Claimant has advised that she did not make the allegations against the Third Respondent because there were ongoing grievance proceedings but the issues she raises with her grievance arose prior to October 2019. This does not therefore explain why she did not include allegation 1 to 3 and 5 in

her claim against the Third Respondent lodged December 2019. The application is made now because the first Respondent is in liquidation.

52. The proceedings have been ongoing since July 2019 when the first claim was lodged. At the Case Management Hearing in November 2020 it was noted that a final hearing in respect of both claims was due to take place by CVP in March, April or May 2021. The effect of the amendment would necessitate additional areas of inquiry regarding the involvement of the Third Respondent in the allegations and result in a process of further specification by the Claimant and adjustment by the Third Respondent in respect of matters arising prior to May 2019 (some 20 months ago). The effect of the amendment would be to add to Third Respondent's costs and is likely to delay this matter reaching a final hearing.

All the circumstances

53. The tribunal should take into account all the circumstances including prospects of success of the amended claim if allowed.
54. The allegations are lacking in specification as regards the Third Respondent. The allegations do not make any specific allegations against the Third Respondent (they do not specify a 'pcp' applied by the Third Respondent). Allegations 1 to 3 and 5 do not contain the necessary factual elements of stateable claims against the Third Respondent and accordingly have no reasonable prospects of success.
55. Allegations 1 to 3 and 5 are also made against the Second Respondent and accordingly the Claimant is not without remedy if the First Respondent is without funds.
56. Balancing the injustice to the Claimant who will be denied a claim for indirect disability discrimination against the Third Respondent in respect of the period prior to 31 May 2019 if the application is refused, against the injustice to the Third Respondent in defending such a claim if the application is granted, and taking into account all the circumstances including the substantial nature of the amendment, the effect of the significant delay in making the application to amend, the absence of stateable claims, the application to amend to include

allegations 1 to 3 and 5 of indirect discrimination against the Third Respondent is refused.

Harassment

57. The Third Responded opposes the Claimant's amendment seeking to include
5 allegations 1, 3, 4, 5 and 7 of unwanted conduct amounting to harassment related to disability (included from the V1 averments). The Third Respondent does not oppose the Claimant's amendment seeking to include allegation 8 to 26 of harassment related to disability from 31 May 2019 onwards.

The nature of the amendment

10 58. Allegations 1, 3, 4, 5 and 7 of unwanted conduct related to disability are in identical terms to the allegations of less favourable treatment and are beset by the same considerations.

15 59. The amendment does not seek to add the Third Respondent as a party to the complaints in first claim. Firstly the Third Respondent is already a party to the complaints in the first claim by virtue of those complaints having been incorporated into the second claim which was raised against the Third Respondent. Secondly the amendment pertains to allegations 1, 3, 4, 5 and 7 of unwanted conduct related to disability which were not contained in the first or second claim but are instead new complaints set out in the V1
20 averments. The amendment is not further specification of complaints which have already been made against the Third Respondent.

25 60. Further allegations 1, 3, 4, 5 and 7 of unwanted conduct related to disability by the Third Respondent were not heralded in the first or second claim (prior to the V1 averments) and the amendment is not a re-labelling of facts which have already been stated.

The applicability of the time limits

30 61. Allegations 1, 3, 4, 5 and 7 of unwanted conduct are said to have arisen in February or March 2019 and to the extent that they are asserted to be continuing acts are understood to have ceased at the latest with the Claimant's resignation in September 2019. Allegations 1, 3, 4, 5 and 7 were

intimated in May 2020, some 8 months after the Claimant's resignation. These allegations are on the face of it out of time and no explanation has been provided for that delay other than the liquidation of the First Respondent and general COVID issues (both arising February 2020) and neither of which therefore explain why these allegations were not made in the 5 month period from September 2019 to February 2020.

The timing and manner of the application

62. The Claimant has advised that she did not make the allegations against the Third Respondent because there were ongoing grievance proceedings but the issues she raises with her grievance arose prior to October 2019. This does not therefore explain why she did not include allegation 1 to 3 and 5 in her claim against the Third Respondent lodged December 2019. The application is made now because the first Respondent is in liquidation.

63. The proceedings have been ongoing since July 2019 when the first claim was lodged. At the Case Management Hearing in November 2020 it was noted that a final hearing in respect of both claims was due to take place by CVP in March, April or May 2021. The effect of the amendment would necessitate additional areas of inquiry regarding the involvement of the Third Respondent in the allegations and result in a process of further specification by the Claimant and adjustment by the Third Respondent in respect of matters arising prior to May 2019 (some 20 months ago). The effect of the amendment would be to add to Third Respondent's costs and is likely to delay this matter reaching a final hearing.

All the circumstances

64. The tribunal should take into account all the circumstances including prospects of success of the amended claim if allowed.

65. The allegations are lacking in specification as regards the Third Respondent. The allegations make some specific allegations against the Second Respondent but do not make any specific allegations against the Third

Respondent (they do not specify unwanted conduct on the part of the Third Respondent). Allegations 1, 3, 4, 5 and 7 do not contain the necessary factual elements of stateable claims against the Third Respondent and accordingly have no reasonable prospects of success.

5 66. Allegations 1, 3, 4, 5 and 7 are also made against the Second Respondent and accordingly the Claimant is not without remedy if the First Respondent is without funds.

67. Balancing the injustice to the Claimant who will be denied a claim for harassment against the Third Respondent in respect of the period prior to 31
10 May 2019 if the application is refused, against the injustice to the Third Respondent in defending such a claim if the application is granted, and taking into account all the circumstances including the substantial nature of the amendment, the effect of the significant delay in making the application to amend, the absence of stateable claims, the application to amend to include
15 allegations 1, 3, 4, 5 and 7 of harassment against the Third Respondent is refused.

Victimisation

68. The Third Responded opposes the Claimant's amendment seeking to include allegations 1, 2, 4 and 5 of detriment because of protected acts (included from
20 the V1 averments). The Third Respondent does not oppose the Claimant's amendment seeking to include allegation 6 to 25 of victimisation because of a protected act from 31 May 2019 onwards.

25 The nature of the amendment

69. Allegations 1, 2, and 4 of detriment are in identical terms to the allegations of less favourable treatment and are beset by the same considerations.

70. The amendment does not seek to add the Third Respondent as a party to the complaints in first claim. Firstly the Third Respondent is already a party to the

complaints in the first claim by virtue of those complaints having been incorporated into the second claim which was raised against the Third Respondent. Secondly the amendment pertains to allegations 1, 2, and 4 of detriment which were not contained in the first or second claim but are instead new complaints set out in the V1 averments. Allegation 5 pertains to withdrawal of an offer of shares by the Second Respondent which is contained in the first and second claim but no detriment by the Third Respondent is specified. The amendment is not further specification of complaints which have already been made against the Third Respondent.

71. Accordingly Allegations 1, 2, 4 and 5 of detriment by the Third Respondent are not heralded in the first or second claim (prior to the V1 averments) and the amendment is not a re-labelling of facts which have already been stated.

The applicability of the time limits

72. Allegations 1, 2, 4 and 5 of detriment are said to have arisen in March or April 2019 and to the extent that they are asserted to be continuing acts are understood to have ceased at the latest with the Claimant's resignation in September 2019. Allegations 1, 2, 4 and 5 of detriment were intimated in May 2020, some 8 months after the Claimant's resignation. These allegations are on the face of it out of time and no explanation has been provided for that delay other than the liquidation of the First Respondent and general covid issues (both arising February 2020) and neither of which therefore explain why these allegations were not made in the 5 month period from September 2019 to February 2020.

The timing and manner of the application

73. The Claimant has advised that she did not make the allegations against the Third Respondent because there were ongoing grievance proceedings but the issues she raises with her grievance arose prior to October 2019. This does not therefore explain why she did not include allegations 1, 2, 4 and 5 of

detriment in her claim against the Third Respondent lodged December 2019. The application is made now because the first Respondent is in liquidation.

74. The proceedings have been ongoing since July 2019 when the first claim was lodged. At the Case Management Hearing in November 2020 it was noted that a final hearing in respect of both claims was due to take place by CVP in March, April or May 2021. The effect of the amendment would necessitate additional areas of inquiry regarding the involvement of the Third Respondent in the allegations and result in a process of further specification by the Claimant and adjustment by the Third Respondent in respect of matters arising prior to May 2019 (some 20 months ago). The effect of the amendment would be to add to Third Respondent's costs and is likely to delay this matter reaching a final hearing.

All the circumstances

75. The tribunal should take into account all the circumstances including prospects of success of the amended claim if allowed.
76. The allegations are lacking in specification as regards the Third Respondent. The allegations make some specific allegations against the Second Respondent but do not make any specific allegations against the Third Respondent (they do not specify acts or deliberate failures to act by the Third Respondent). Allegations 1, 2, 4 and 5 of detriment do not contain the necessary factual elements of stateable claims against the Third Respondent and accordingly have no reasonable prospects of success.
77. Allegations 1, 2, 4 and 5 of detriment are also made against the Second Respondent and accordingly the Claimant is not without remedy if the First Respondent is without funds.
78. Balancing the injustice to the Claimant who will be denied a claim for victimisation against the Third Respondent in respect of the period prior to 31 May 2019 if the application is refused, against the injustice to the Third Respondent in defending such a claim if the application is granted, and taking into account all the circumstances including the substantial nature of the amendment, the effect of the significant delay in making the application to

amend, the absence of stateable claims, the application to amend to include allegations 1, 2, 4 and 5 of detriment against the Third Respondent is refused.

Discrimination arising from disability

5 79. The Third Responded opposes the Claimant's amendment seeking to include allegations 1 to 9 and 11 of unfavourable treatment because of something arising in consequence of disability (included from the V3 averments). The Third Respondent does not oppose the Claimant's amendment seeking to include allegation 12 to 30 of unfavourable treatment from 31 May 2019 onwards.

10 The nature of the amendment

80. Allegations 1 to 9 and 11 of unfavourable treatment are in identical terms to the allegations of less favourable treatment and are beset by the same considerations.

15 81. The amendment does not seek to add the Third Respondent as a party to the complaints in first claim. Firstly the Third Respondent is already a party to the complaints in the first claim by virtue of those complaints having been incorporated into the second claim which was raised against the Third Respondent. Secondly the amendment pertains to allegations 1 to 9 and 11 of unfavourable treatment which were not contained in the first or second
20 claim but are instead new complaints set out in the V3 averments. The amendment is not further specification of complaints which have already been made against the Third Respondent.

82. Further allegations 1 to 9 and 11 of unfavourable treatment by the Third Respondent were not heralded in the first or second claim (prior to the V1
25 averments) and the amendment is not a relabelling of facts which have already been stated.

The applicability of the time limits

83. Allegations 1 to 9 and 11 of unfavourable treatment are said to have arisen in January, February or March 2019 and to the extent that they are asserted to
30 be continuing acts are understood to have ceased at the latest with the

Claimant's resignation in September 2019. Allegations 1 to 9 and 11 of unfavourable treatment were intimated in January 2021, but were included as allegations of less favourable treatment in May 2020, some 8 months after the Claimant's resignation. These allegation are on the face of it out of time and no explanation has been provided for that delay other than the liquidation of the First Respondent and general COVID issues (both arising February 2020) and neither of which therefore explain why these allegations were not made in the 5 month period from September 2019 to February 2020.

The timing and manner of the application

84. The Claimant has advised that she did not make the allegations against the Third Respondent because there were ongoing grievance proceedings but the issues she raises with her grievance arose prior to October 2019. This does not therefore explain why she did not include allegation 1 to 9 and 11 in her claim against the Third Respondent lodged December 2019. The application is made now because the first Respondent is in liquidation.

85. The proceedings have been ongoing since July 2019 when the first claim was lodged. At the Case Management Hearing in November 2020 it was noted that a final hearing in respect of both claims was due to take place by CVP in March, April or May 2021. The effect of the amendment would necessitate additional areas of inquiry regarding the involvement of the Third Respondent in the allegations and result in a process of further specification by the Claimant and adjustment by the Third Respondent in respect of matters arising prior to May 2019 (some 20 months ago). The effect of the amendment would be to add to Third Respondent's costs and is likely to delay this matter reaching a final hearing.

All the circumstances

86. The tribunal should take into account all the circumstances including prospects of success of the amended claim if allowed.

87. The allegations are lacking in specification as regards the Third Respondent. The allegations make some specific allegations against the Second Respondent but do not make any specific allegations against the Third

Respondent (they do not specify acts or deliberate failures to act by the Third Respondent). Allegations 1 to 9 and 11 do not contain the necessary factual elements of stateable claims against the Third Respondent and accordingly have no reasonable prospects of success.

5 88. Allegations 1 to 9 and 11 are also made against the Second Respondent and accordingly the Claimant is not without remedy if the First Respondent is without funds.

89. Balancing the injustice to the Claimant who will be denied a claim for discrimination arising from disability against the Third Respondent in respect
10 of the period prior to 31 May 2019 if the application is refused, against the injustice to the Third Respondent in defending such a claim if the application is granted, and taking into account all the circumstances including the substantial nature of the amendment, the effect of the significant delay in making the application to amend, the absence of stateable claims, the
15 application to amend to include allegations 1 to 9 and 11 of discrimination arising from disability against the Third Respondent is refused.

Failure to make reasonable adjustments

90. The Third Responded opposes the Claimant's amendment seeking to include allegations 1 to 3 and 5 of failure to make reasonable adjustments (included
20 from the V1 and V3 averments). The Third Respondent does not oppose the Claimant's amendment seeking to include allegation 4 of failure to make reasonable adjustments.

25 The nature of the amendment

91. Allegations 1 to 3 and 5 of failures by the Third Respondent (or otherwise) are not heralded in the first or second claim (prior to the V1 and V3 averments) and accordingly are new allegations against the Third Respondent.

92. The Claimant does not seek to add the Third Respondent as a party since she is already a party to the proceedings.

The applicability of the time limits

93. Allegations 1 to 3 and 5 are said to have arisen in February or June 2019
5 onwards and to the extent that they are asserted to have been continuously
applied are understood to have ceased at the latest with the Claimant's
resignation in September 2019 (a time period is not stated but this is inferred
from the claims for indirect discrimination which are otherwise in identical
terms). Allegations 1 to 3 were intimated in May 2020, some 8 months after
10 the Claimant's resignation. Allegation 5 was intimated in January 2021, some
16 months after the Claimant's resignation. These allegation are on the face
of it out of time and no explanation has been provided for that delay other than
the liquidation of the First Respondent and general covid issues (both arising
February 2020) and neither of which therefore explain why these allegations
15 were not made in the 5 month period from September 2019 to February 2020.

The timing and manner of the application

94. The Claimant has advised that she did not make the allegations against the
Third Respondent because there were ongoing grievance proceedings but
the issues she raises with her grievance arose prior to October 2019. This
20 does not therefore explain why she did not include allegation 1 to 3 and 5 in
her claim against the Third Respondent lodged December 2019. The
application is made now because the first Respondent is in liquidation.

95. The proceedings have been ongoing since July 2019 when the first claim was
lodged. At the Case Management Hearing in November 2020 it was noted
25 that a final hearing in respect of both claims was due to take place by CVP in
March, April or May 2021. The effect of the amendment would necessitate
additional areas of inquiry regarding the involvement of the Third Respondent
in the allegations and result in a process of further specification by the
Claimant and adjustment by the Third Respondent in respect of matters
30 arising prior to May 2019 (some 20 months ago). The effect of the amendment

would be to add to Third Respondent's costs and is likely to delay this matter reaching a final hearing.

All the circumstances

- 5 96. The tribunal should take into account all the circumstances including prospects of success of the amended claim if allowed.
- 10 97. The allegations are lacking in specification as regards the Third Respondent. The allegations do not make any specific allegations against the Third Respondent (they do not specify a 'pcp' applied by the Third Respondent). Allegations 1 to 3 and 5 do not contain the necessary factual elements of stateable claims against the Third Respondent and accordingly have no reasonable prospects of success.
- 15 98. Allegations 1 to 3 and 5 are also made against the Second Respondent and accordingly the Claimant is not without remedy if the First Respondent is without funds.
- 20 99. Balancing the injustice to the Claimant who will be denied a claim for failure to make reasonable adjustments against the Third Respondent in respect of the period prior to 31 May 2019 if the application is refused, against the injustice to the Third Respondent in defending such a claim if the application is granted, and taking into account all the circumstances including the substantial nature of the amendment, the effect of the significant delay in making the application to amend, the absence of stateable claims,

the application to amend to include allegations 1 to 3 and 5 of failures to make reasonable adjustment against the Third Respondent is refused.

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Employment Judge: Michelle Sutherland
Date of Judgment: 28th January 2021
Entered in Register: 17th February 2021
Copied to Parties