EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Beata Klim

and

Respondent: Garden Balcony Co Ltd

HELD AT London South ON 17 March 2021

EMPLOYMENT JUDGE PHILLIPS

Appearances:

For Claimant: Mr A R Lukomski, Consultant

For Respondent: Mr S Jagpal, Advocate

JUDGMENT

The Claimant's application to amend her ET1/Claim Form to add a claim of indirect sex discrimination is allowed.

REASONS

1. I had available to me, a small pdf bundle of relevant documents, including the ET1, the ET3, further particulars of the ET1 and the Order of 15 October 2020. Where a document from this bundle is referred to below, the relevant page reference is given so [xx].

2. The Respondent is in the business of installing, supplying and hiring artificial grass. The Claimant was employed as its office manager between 27 March 2019 and 31 January 2020. The Claimant says that it was agreed that she would be paid £22,000 per annum *net after deductions*. The Respondent says the agreed salary was £22,000 *gross* per annum. The Claimant says that during her employment the Respondent failed to pay her the agreed rate of pay. Further, she says that throughout the duration of her employment, the

Respondent failed to provide her with a toilet for the sole use of ladies, forcing her to use shared toilet facilities that were not in compliance with legal requirements (the Workplace (Health, Safety and Welfare) Regulations 1992. In her ET1 Claim Form [3-13], and the attached particulars of claim [14-17], the Claimant brings claims of (1) automatically unfair dismissal (under sections 103 and 104 ERA); (2) sex discrimination; (3) unpaid wages/breach of contract/wrongful dismissal; and (4) loss of pension contributions.

3. The Respondent in its ET3 Response [22-28] and attached explanatory letter [29-32], denied all the claims.

4. On 15 October 2020, Employment Judge Tsamados considered the ET 1 and ET3 [36-38] and noted that the wrongful dismissal claim was in effect a claim for damages for breach of contract; and that the Tribunal had no jurisdiction in respect of the loss of pension contributions claim, save to the extent that it might form part of a compensatory award. He also made an order requiring the Claimant, on or before 30 October 2020, to provide further particulars of the ET1 claim, in the following terms [37]:

    1) With regard to the automatically unfair dismissal claim as a result of making a protected disclosure under section 103 ERA, to set out each and every protected disclosure relied upon, including dates and details, and who the disclosure was made to and which parts of section 43B ERA were relied upon;

    2) With regard to the sex discrimination claim, to set out each and every act of discrimination relied upon, including dates and details as to who was involved, who it is that allegedly discriminated against the Claimant, the type of discrimination that is claimed by reference to the Equality Act and, if it is a direct discrimination claim, who was the comparator.

5. The Claimant provided further particulars of the ET1 claim [18-20], pursuant to the 15 October Case Management Order. In those further particulars, the Claimant provided further information and details relating to

    1) her automatically unfair dismissal claim under section 104 ERA 1996 but made no mention of and provided no further details of the automatically unfair dismissal protected disclosure claim made in the ET1 under section 103 ERA 1996;
    2) her sex discrimination claim: it was said that this was a case of “direct as well as indirect discrimination” and that in the direct discrimination claim, the Claimant relied upon a hypothetical male colleague as a comparator. No “provision, criteria or practice” was specified or set out as regards the indirect sex discrimination claim.

6. The Respondent submits that the particulars as provided are inadequate, vague, repeat what is already in the ET1 and that the claims under section 103 ERA and the indirect sex discrimination should be struck out. Mr Jagpal says in any event for such claim to go forward there should at the least be an amendment application. Mr Lukomski relies on the general pleading of Sex discrimination in the ET1, the factual details provided and that it was clarified in the further particulars that this was put as a direct and indirect sex discrimination claim. He says no further application to amend is needed, at best it is a matter of providing further particulars.

7. I have considered the matter is the round, taking account of all the circumstances, including for the avoidance of any doubt considering this as if an application to amend had been made.

Relevant law

8. The authorities with regard to amendments are set out in a number of cases including *Cocking v Sandhurst* [1974] ICR 650, *British Newspaper Printing Corporation (North) Ltd v Kelly* [1989] IRLR 222, *Selkent Bus Co v Moore* [1996] IRLR 661, *Housing Corporation v Bryant* [1999] ICR 123, *Harvey v Port of Tilbury (London) Ltd* [1999] ICR 1030, *Ali v Office of National Statistic*s [2005] IRLR 201, *Abercrombie v Aga Rangemaster plc* [2013] EWCA 1148. It was most recently considered by the EAT in *Vaughan v Modality Partnership* [2021] IRLR 97.

9. The EAT in *Selkent*, to which I was specifically referred, stated a number of general principles, which it said were applicable to the amendment of tribunal claims: namely that whenever the discretion to grant an amendment is invoked, a 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”. In terms of what the relevant circumstances might be, the EAT said it was ‘impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant”: (a) the nature of the amendment”; (b) the applicability of time limits; and (c) the timing and manner of the application.

10. In *Ali v Office of National Statistic*s, which Mr Jagpal referred me to, Mr Ali argued that he had already identified an indirect discrimination claim because he had referred to race discrimination generally, and relied on a 1995 case (*Quarcoopome*) which said that that was enough to cover both direct and indirect discrimination. The Court of Appeal disagreed, saying that it was a brand new claim that was being brought late. The Court of Appeal decided that whether a claim form contains a specific claim can only be judged by looking at the document as a whole, i.e. by looking at the name given to the claim as well as the factual details accompanying it. If, however, the claim is very general (such as "discrimination"), then the particulars need to be specific so

that employers are clear about what claim is being made against them, as direct and indirect discrimination are two separate types of unlawful act.

11. In *Vaughan*, the EAT reviewed the law and provided guidance on the correct approach to applications to amend. Judge Tayler pointed out that the key test in considering applications is the balance of injustice and hardship to each party in either allowing or refusing the application. He stated that the *Selkent* factors are "examples" and "should not be taken as a checklist to be ticked off to determine the application but are factors to take into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment". Judge Tayler emphasised that these factors are not a checklist, and that the first consideration might be to start by considering the "real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of the success of the claim or defence; if permitted what will be the practical problems in responding".

12. Principles relating to applications to amend are also set out in the Presidential Guidance (2018) Guidance Note 1. These are derived from *Selkent* and *Abercrombie*. There are no time limits laid down in the Rules for the making of amendments, so in practice amendments may be made at any time – before, at, even after the hearing of the case.

Submissions

13. Mr Jagpal submitted that the indirect discrimination claim was vague and out of time. It was not pleaded in the ET1, and further, he said it was still was not properly particularised in the further particulars that had been supplied. While Mr Jagpal accepted that there was a degree of informality in tribunal proceedings, he submitted that there still needed to be an application to amend to plead the indirect claim, which was in effect a new claim, and said that it was out of time and that it would be unfair and prejudicial to the Respondent to allow such a claim to go forward at this time. He said some considerable amount of time had lapsed since the Claimant's employment had ended. He said the Claimant was represented by professional advisers throughout. He noted that in *Bexley Community Centre (t/a Leisure Link) v. Robertson* [2003] EWCA Civ 576, it was held that time extensions should be the exception, not the norm, and the burden of equity and justifiability fall to the Claimant. The Respondent submits that the application does not satisfy the circumstances for an exception to be made and requested the Tribunal to not allow the indirect discrimination claim to stand. He also specifically directed me to the case of *Ali v Office of National Statistic*s [2005] IRLR 201, which related to a similar example of attempting to add an indirect discrimination claim, where it was said general pleadings of discrimination could not be relied upon.

14. Mr Lukomski conceded that the automatically unfair dismissal claim under s 103 ERA had not been particularised at all in the further particulars provided, and indicated that it was not in fact being proceeded with. He said the Claimant was only relying on the s 104 ERA statutory rights claim. I said that the s 103 ERA claim should therefore be struck out on withdrawal and Mr Lukomski accepted that was the appropriate cause of action. I will issue a separate judgment with regard to that.

15. Mr Lukomski pointed out that the basic information requested by EJ Tsamados had been provided within the time limit. He said no further complaint had been made by the Respondent until now. He said the factual details relied upon for the indirect discrimination claim were the same as those relied upon and detailed for the direct claim. He clarified that as far as the direct discrimination claim was concerned, the Claimant relied upon two continuing acts: (1) the failure to provide a toilet for the sole use of ladies; and (2) that the Claimant was forced to share a block of toilets that was used by all the men on the industrial estate, which facilities were not in compliance with legal requirements. Further, he said the act of dismissal was relied upon as a further instance of direct discrimination. He said a hypothetical male colleague was relied upon as a comparator.

16. In discussion, he said that in general terms, the PCP for the indirect claim would be based around the obligation to use shared toilet facilities which were not in a fit state, but said that this would be something he would want counsel to draft, so as make sure it was right. Mr Lukomski accepted that perhaps things had not been as well put as they should have been, but said the ET1 referred to sex discrimination, that his further particulars had specified, as had been asked by EJ Tsamados, which aspects of the Equality Act were relied upon, namely he had set put that the claim was both direct and indirect. He said he had not been asked to set out a PCP. He said it would be unfair and prejudicial to prevent the Claimant from bringing this claim, given matters were still at a relatively early stage of proceedings. He took exception to the reference to cases by Mr Jagpar which he had not been given advanced notice of.

Discussion and conclusion

17. As indicated above the automatically unfair dismissal claim under s 103 ERA is not now being proceeded with. On that basis the focus of this judgment is on the indirect sex discrimination claim.

18. There is nothing in the Tribunal Rules of Procedure dealing specifically with amendments. They fall within the general case management powers of the Tribunal. No formal application to amend has been made here, but should such an application be necessary, it is not in dispute that that has been the effect of the discussions today.

19. Information that arises out of the provision of further particulars can often be controversial, especially when it appears to flag a head of claim or new information that may not have been expressly or obvious from the original pleading. Indeed, one of the main purposes of seeking further information, is so that all issues and relevant facts can be teased out early on, to avoid delay or prejudice at a hearing. Another is to ensure clarity, and identify issues so that both parties but particularly a Respondent knows ahead of any hearing what case it has to answer. It is not uncommon therefore that when further particulars of a claim are provided, they raise matters, whether of fact or law, which were not in the original ET1. That can give rise to argument that such matters are new and therefore need amendment and / or raise issues as to whether they have been brought in time. There is disagreement between the parties here as to whether the indirect sex discrimination claim is a new claim, and /or requires an amendment application or whether it is a matter of particularisation. Mr Lukomski says it is merely particularising an already pleaded claim. Mr Jagpal disagrees.

20. The ET1 in this case contains only a very general assertion of a sex discrimination claim. Factual details are provided but there is little attempt to tie this into the heads of claim. Some clarification comes in the further particulars that both a direct and indirect claim of sex discrimination are being brought. No further details are provided of the indirect claim, although factual details, some of which repeat what is in the ET1, are provided. Mr Lukomski said no new facts are relied upon for the indirect claim. Mr Jagpal said, referring to *Ali v Office of National Statistic*s that a general pleading of discrimination could not be relied upon to insert a later indirect discrimination claim. I noted that in *Vaughan*, the EAT had provided updated guidance on what it said was the correct approach to applications to amend, namely that the key test in considering such applications is the balance of injustice and hardship to each party in either allowing or refusing the application: the *Selkent* factors "should not be taken as a checklist to be ticked off to determine the application but are factors to take into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment". It is the case here that the ET1 simply refers to a sex discrimination claim. The further particulars provide a headline of indirect discrimination but not tied in details . In particular no PCP has been identified.

21. Taking the starting point suggested in *Vaughan*, and looking at the exercise of balancing the injustice or hardship of allowing or refusing the amendment, in my judgement, the real practical consequences of allowing or refusing the amendments here fall in favour of allowing them. It is still, despite the passage of time since the ET1 was submitted, relatively early days in procedural terms. It is correct that the ET3 has been served, and amendments may be needed if there is a fully pleaded indirect discrimination claim. Further particulars of ET1s are not uncommon, even with professional advisers. In this instance, allowing the indirect sex discrimination claim to stand and providing the Claimant with a

further chance to particularise it, is in my view the just and equitable and proportionate way to proceed here. There is no doubt that direct and indirect discrimination are two separate types of unlawful act and that particulars need to be specific so that employers are clear about what claim is being made against them. The particulars here are vague and insufficiently precise. Nonetheless, such inadequacy is in my judgment most fairly dealt with by way of further particulars rather than striking the claim out at this stage. This should not in my assessment create enormous practical difficulties for the Respondent. No disclosure has yet taken place, nor have witness statements been exchanged. All of that is still to come. The existing well detailed direct dismissal claim covers much of the same factual ground, so it appears that all the background facts have been pleaded. What is really missing is the particularisation of the PCP and tying the elements of disadvantage that are relied upon to the facts that have been pleaded.

22. On the other hand, if the amendment is refused, it may deny the Claimant a potentially successful cause of action. Looking additionally at the factors suggested in *Selkent*, while this cannot in my judgment be said to a mere 're-labelling', nor is it such an extreme case as to be said to be entirely new, nonetheless it is still an alteration which is pleading a new cause of action. An application should not be refused solely because there has been a delay in making it. As I have said, in this case the delay is relatively speaking in terms of the procedural progress of the case, insignificant.

23. Having considered as set out above, all the circumstances, and bearing in mind that the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment, I have decided to allow the Claimant's claim of indirect sex discrimination to go forward, so long as she provides proper particulars of it to the Respondent within 14 days from the date of today's hearing. On balance, despite the passage of time, I see relatively little injustice to the Respondent and the potential of much large injustice if the potential claims do not go forward for consideration by the Tribunal that hears the case.

Employment Judge Phillips
17 March 2021, London South
Date and place of Order