



# EMPLOYMENT TRIBUNALS

## At an Closed Attended Preliminary Hearing By Cloud Video Platform

**Claimant:** Mrs D Spencer  
**Respondent:** UNISON Leicestershire Health Branch

**Heard at:** Nottingham  
**On:** 9 April 2021  
**Before:** Employment Judge Hutchinson (sitting alone)

### Representation

**Claimant:** Mr J Fireman of Counsel  
**Respondent:** Ms E Hodgetts of Counsel

## JUDGMENT

The application to amend the claim made on 15 January 2021 is granted in part.

## REASONS

### Background

1. The Claimant presented her claim to the tribunal on 8 September 2020. She had been employed by the Respondent as its Branch Convener and Administrative Assistant from 9 August 2010 until her resignation, which took effective on 18 September 2020. The Claimant had resigned from her employment by notice dated 24 August 2020.

2. Her claims were;

- 2.1 constructive unfair dismissal;
- 2.2 holiday pay;
- 2.3 whistleblowing detriment;
- 2.4 victimisation;
- 2.5 wages.

3. The Claimant was advised by solicitors in the presentation of her claim and, as a convener for the Respondent, she also had a good grasp of employment law and making tribunal claims.

4. The statement of claim is extensive. It goes to 65 paragraphs and is 19 pages long.

5. The Claimant summarised her complaints in paragraphs 3 and 4 of the statement of case. That says;

*“3. On 24<sup>th</sup> August 2020, the Claimant submitted her resignation following the Claimant being issued with an ultimatum to either return to working in the office or take annual leave or unpaid leave. The Claimant felt it was unsafe to return to work as the current COVID-19 guidelines were not being followed by the Respondent and instead the Claimant was able to work effectively from home as she had demonstrated for eight weeks already. However, this was not being accepted by the Respondent and led to the Claimant raising a formal grievance which also has not been dealt with to date.*

*4. The Claimant brings claims of constructive unfair dismissal, whistleblowing and victimisation.”*

6. Paragraphs 5 to 50 deal with the facts of the case and paragraphs 51 to 65 identifies the claims.

7. In respect of the constructive unfair dismissal claim, the Claimant set out the facts that she relied on as constituting the fundamental breach of contract.

8. In respect of the whistleblowing complaint, the Claimant identified the two protected disclosures that she said that she had made, namely the email of 22 May 2020 and the grievance of 3 June 2020.

9. In paragraph 63, the Claimant set out that the detriments that she said that she had suffered. She said that these detriments qualified as protected disclosures pursuant to section 43B(1)(b) and (d).

10. The claim was extensively responded to by the Respondent. The grounds of resistance itself is 24 pages and has 137 paragraphs.

### **The case management preliminary hearing**

11. The case was listed for a case management preliminary hearing on 5 January 2021 and this was heard by my colleague, Employment Judge Michael Butler. The Claimant made an application to amend her claim, which was emailed to the tribunal and to the Respondent less than 2 hours before the hearing. No explanation was given as to why this application was being made at such a late stage.

12. My colleague, Employment Judge Butler, determined that the application to

amend would be heard at a closed preliminary hearing today.

13. He made case management orders and I note that he extended the final hearing to a 5-day hearing commencing on 17 June 2022.

14. The Claimant subsequently made a formal application to amend her claim on 15 January 2021 and I have seen that, together with the Respondent's response to the application, which is dated 21 January 2021.

### **The hearing today**

15. The parties provided me with an agreed bundle of documents and I also had a witness statement from the Claimant. I heard submissions from both Mr Fireman and Ms Hodgetts.

16. I note that Mr Fireman and Mrs Spencer have given me no explanation for the delay in making the application to amend and I therefore have no satisfactory reason for the delay. As I have noted above, the claim was presented by solicitors on 8 September 2020 and the application to amend was not made until 4 months later.

17. At the preliminary hearing, the Claimant withdrew her claims of victimisation and unauthorised deduction from wages and these were dismissed by my colleague Employment Judge Butler.

18. Several allegations are being withdrawn and the Respondent and myself have no objection to that. Some of the matters are truly issues of relabelling and, generally, I am happy for those to be amended. Other parts of the application are much more than that and, in my view, seek to change the case and/or add complaints.

### **The law**

19. Both parties referred me to the case of ***Selkent Bus Company Ltd v Moore [1996] ICR 836***.

20. I was also referred to;

***Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148***  
***Galilee v The Commissioner of Police of the Metropolis [2018] ICR 667***  
***Vaughan v Modality Partnership LLP***

21. Ms Hodgetts also reminded me that the principles in respect of amendments and their application is set out in the Employment Tribunals (England and Wales) Presidential Guidance – General Case Management 2018 - Guidance Note 1.

22. Paragraph 5 of the Guidance Note deals with the relevant factors that are set out in the case law referred to above;

*“5.1 The amendment to be made. Applications can vary from the correction of clerical and typing errors to the addition of facts, the addition or substitution*

*of labels for facts already described, and the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal must decide whether the amendment applied for is a minor matter or a substantial alteration, describing a new complaint.*

*5.2 Time limits. If a new complaint or cause of action is intended by way of amendment, the Tribunal must consider whether that complaint is out of time and, if so, whether the time limit should be extended. Once the amendment has been allowed, and time taken into account, then that matter has been decided and can only be challenged on appeal. An application for leave to amend when there is a time issue should be dealt with at a preliminary hearing to address a preliminary issue. This allows all parties to attend, to make representations and possibly even to give evidence.*

*5.3 The timing and manner of the application. An application can be made at any time, ... Allowing an application is an exercise of a judicial discretion. A party will need to show why the application was not made earlier and why it is being made at that time. An example which may justify a late application is the discovery of new facts or information ...*

*9. If the claim form includes facts from which such a claim can be identified, the Tribunal as a rule adopts a flexible approach and grants amendments that only change the nature of the remedy claimed. ...*

*10. While there may be a flexibility of approach to applications to re-label facts already set out, there are limits. Claimants must set out the specific acts complained of,...*

*11.2 It will not always be just to allow an amendment even where no new facts are pleaded. The Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Where for instance a claimant fails to provide a clear statement of a proposed amendment when given the opportunity through case management orders to do so, an application at the hearing may be refused because of the hardship that would accrue to the respondent.”*

### **My conclusions**

23. Some of the amendments are not in dispute and I deal with the application by reference to the amendment application made on 15 January 2021, which sets out in paragraph 5 the amendments sought.

24. Paragraph 5 (a) - **Minor clarifications to the backgrounds section.**

24.1 The Respondent has indicated their consent now to the minor clarification set out in paragraphs i. – iii. and I agree that these amendments can be made.

26. Paragraph 5 (b) - **Amendment of the acts specifically highlighted as**

**contributing to the breach of the implied term of trust and confidence.**

26.1 I agree and the Respondent agrees that items referred to in vi., vii. and viii. are allowed.

26.2 In respect of the items at i. to v., I am not prepared to agree to these amendments. I am satisfied that this is a fundamental change of the factual case the Claimant brings. The Claimant has not explained why she has changed her factual case on this point. The Claimant has confirmed that she had seen the original statement of case before it was presented but has not provided any explanation of why she wishes to change her case or the delay in doing so. I note that she was legally advised at the time and the Claimant has herself considerable knowledge and experience of employment law. As Ms Hodgetts explained, there will be a credibility and a reasonableness perspective point arising out of the Claimant's case as to how she regarded the Respondent's act and it will prejudice the Respondent in exploring the Claimant's credibility if she is simply allowed to change her factual case.

26.3 Regarding paragraph ix., this is again a change of the factual basis of the claim and whilst the Claimant refers to these matters in her facts of the case, she has not previously placed any reliance on it. As above, the Claimant has not explained why she has changed her factual case on this point and again has given no explanation about the delay in dealing with this.

26.4 For these reasons, I am satisfied that the application to amend these parts of paragraph 5 (b) should be refused.

27. Paragraph 5 (c) - **Protected disclosure detriments.**

27.1 In respect of i. and ii., these are not disputed and I agree to these amendments.

27.3 In respect of iii., for the same reasons as before, I am not prepared to agree to these.

27.4 In respect of paragraph iv., I am satisfied that this is a significant factual amendment. It seeks to introduce a new detriment. It also seeks to rely on an event later in time, i.e. 7 September 2020 than any of the other events but which nevertheless took place before the claim was presented on 8 September 2020.

27.5 I note that the Claimant had contacted ACAS on 13 August 2020 and a certificate was issued on that day. It therefore follows that this claim is out of time and again there is no explanation why the Claimant has not advanced this detriment until 5 January 2021. I note that the Claimant already relies on a significant number of detriments and this will add further enquiry and deliberation to what is already a factually complex case. The alleged detriment adds nothing to it and I am satisfied that there is no prejudice to the Claimant in her not being able to pursue that detriment.

28. Paragraph 5 (d) – **The addition of claims under section 44(d) and (e) and section 100(d) and (e) of the Employment Rights Act 1996.**

28.1 This relates to an addition of new claims. The Claimant had chosen to rely on detriments in her claim under legal advice and again there has been no explanation why 4 months later she sought to add these claims.

28.2 I am satisfied again that they do not add anything to her case. The Claimant is simply seeking to bring further causes of action that she should have brought at the time. This is already a complex claim and there is no justification for allowing the Claimant to add these claims to her claim.

## **ORDERS**

### **Made pursuant to the Employment Tribunal Rules 2013**

1. The Claimant is to file an amended claim in accordance with the terms of this Order by **23 April 2021**.
2. The parties are to agree a list of issues in respect of the claims by **21 May 2021**.
3. The parties are to exchange lists of documents they intend to rely on which are relevant to the claims by **3 September 2021**.
4. The Claimant will provide copies of any documents that the Respondent does not have copies of by **10 September 2021**.
5. The Respondent is to responsible for the preparation of the agreed bundle of documents and will forward the bundle to the Claimant by **24 September 2021**.
6. The parties are to exchange witness statements by **5 November 2021**.
7. The Respondent is to provide **7 days before the hearing** by email and hard copy, 3 copies of the bundle of documents and all the witness statements.

### **Judicial Mediation**

8. The Respondent will consider whether they are interested in Judicial Mediation and let me know by **23 April 2021** if they are. A further telephone discussion will then take place to list the Judicial Mediation hearing.

### **The final hearing**

9. The final hearing will remain as listed but will be conducted by CVP. Details of how to join the hearing will be provided at a later date.

## **NOTES**

- (i) **The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.**

- (ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
- (iii) The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
- (iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’:  
<https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf>
- (iv) The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*” If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

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**Employment Judge Hutchinson**

Date: 29 April 2021

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