EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms L Walker	AND	University Hospitals Dorset NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 7 June 2021

EMPLOYMENT JUDGE J Bax

JUDGMENT ON APPLICATION TO AMEND

The Claimant's application to amend the grounds of claim is granted.

REASONS

1. In this case the Claimant sought leave to amend the claim which is currently before the Tribunal, and the Respondent opposed that application. The application was been considered on the papers at the request of the parties. I read the written submissions by both parties.

The claim as it stood before the application

2. The general background and procedural history of the claim as it stood before the determination of this application was as follows. The Claimant presented her claim on 21 September 2020 in which she brought claims of detriment under s. 44(1)(d) and (e) of the Employment Rights Act 1996 and discrimination on the grounds of disability and pregnancy/maternity. The Claimant notified ACAS of the dispute on 7 July 2020 and the certificate was issued on 21 August 2020.

3. The application was to add a further allegation of detriment to the s. 44 claim, namely that, the Respondent, 'failed to accommodate and/or properly explore home working.'

4. The claim set out in paragraph 6 of the grounds of claim that the Claimant raised concerns about attending work because she was concerned about contracting covid-19. In paragraph 20 reference was made to the Claimant's partner having e-mailed the Respondent in April 2020 , although the details of the e-mail were not pleaded.

5. The Grounds of Resistance, at paragraph 9, refers to the Claimant's partner, on 9 April 2020, asking Ms King if the Claimant could work from home and that he was told it was not possible

6. On 5 May 2021, at a Telephone Case Management Preliminary Hearing, counsel for the Claimant raised that there was a possible further allegation of detriment, but he was without instructions, but said that it would form part of the general factual matrix. The solicitor for the Respondent was also unable to respond to any application to amend on the basis that documents needed to be checked and it was not believed that the possible amendment issue had been raised. The Respondent was also given permission to file an amended response by 30 June 2021.

The application

7. In the application the Claimant acknowledged that home working is not directly referred to in the claim form, but submitted that the e-mail referred to in paragraph 20 of the grounds of claim contained a suggestion that the Claimant could work from home. During the grievance process home working was discussed on 14 January 2021 and the grievance outcome was provided in February 2021. The Claimant submits that the issue is inextricably linked to the first three pleaded detriments which included being told that she must attend work unless she was able to produce a government letter or letter from her GP and in the absence of such documents and med-3 certificate. It was also submitted that it was a crucial piece of the overall picture.

8. The Respondent opposed the application on the basis that the Claimant had been legally represented throughout and the application was made nearly 8 months after the claim was presented and it was not clear why it was not reasonably practicable for the detriment to have been included when the claim was presented. The Respondent says it will be put to hardship and/or prejudice , because it will need to defend a further allegation and will incur additional time and costs in preparing its response and its defence strategy will be altered. It is not accepted that the proposed amendment was

discussed in any significant detail at the grievance meeting in November 2020 and homeworking was only mentioned as a passing comment. It was accepted that the Claimant's partner had raised the issue of homeworking with Ms King. It was submitted that it only has seemed to have become an issue since counsel had been instructed by the Claimant. It is submitted that the background detail can be read by the Tribunal and she already has 7 allegations of detriment and the balance of hardship falls in favour of the Respondent.

The law

9. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of Chapman v Simon [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.

10. In Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA.

11. In Transport and General Workers' Union v Safeway Stores Limited EAT 0092/07 Underhill P as he then was overturned a Tribunal's refusal to allow an amendment because there was no attempt to apply the Cocking test, and, specifically, no review of all the circumstances including the relative balance of injustice.

12. The EAT held in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors would include:

13. 1 - The nature of the proposed amendment - applications to amend range, 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 for 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 has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and

14. 2 - The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended [the word "essential" is considered further below]; and

15. 3 - The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. 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 on discovery.

16. These factors are not exhaustive and there may be additional factors to consider, (for example, 4 - The merits of the claim). The more detailed position with regard to each of these elements is as follows, dealing with each of them in turn:

17. 1 - The nature of the proposed amendment: A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim (often called "relabelling"); and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

18. Mummery J in Selkent suggests that this aspect should be considered first (before any time limitation issues are brought into the equation) because it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from "relabelling" the existing claim. If it is a purely relabelling exercise than it does not matter whether the amendment is brought within the timeframe for that particular claim or not – see Foxtons Ltd v Ruwiel UKEAT/0056/08. Nevertheless, whatever type of amendment is proposed the core test is the same: namely reviewing all the circumstances including the relative balance of injustice in deciding whether or not to allow the amendment (that is the Cocking test as restated in Selkent).

19. The fact that there is a new cause of action does not of itself weigh heavily against amendment. The Court of Appeal stressed in Abercrombie and ors v Aga Rangemaster Ltd 2013 IRLR 953 CA that Tribunals should, when considering applications to amend that arguably raise new causes of action, 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".

20. Any mislabelling of the relief sought is not usually fatal to a claim. Where the effect of the proposed amendment is simply to put a different legal label on facts that are already pleaded, permission will normally be granted.

21. 2 - The applicability of time limits: This factor only applies where the proposed amendment raises what effectively is a brand new cause of action (whether or not it arises out of the same facts as the original claim). Where the amendment is simply changing the basis of, or "relabelling", the existing claim, it raises no question of time limitation – (see for example Foxtons Ltd v Ruwiel UKEAT/0056/08 per Elias P at para 13).

22. On the applicability of time limits and the "doctrine of relation back", the doctrine of relation back does not apply to Employment Tribunal proceedings, see Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN. The guidance given by Mummery J in Selkent and his use of the word "essential" should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered. The judgments in both Transport and General Workers' Union v Safeway Stores Limited UKEAT 009207 and Abercrombie v AGA Rangemaster Limited [2014] ICR 209 CA emphasised that the discretion to permit amendment was not constrained necessarily by limitation.

23. See also Reuters Ltd v Cole UKEAT/0258/17/BA at para 31 per HHJ Soole: "In this respect a potential issue arises from the conflict in EAT authorities as to whether the Tribunal must definitively determine the time point when deciding on the application to amend (Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge and Others UKEATS/0007/16 (12 August 2016)) or whether the applicant need only demonstrate a prima facie case that the primary time limit (alternatively the just and equitable ground) is satisfied (Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN (22 November 2017)). In the light of the exhaustive analysis of the authorities undertaken by His Honour Judge Hand QC in Galilee, I would follow the latter approach."

24. 3 - The timing and manner of the application: This effectively concerns the extent to which the applicant has delayed making the application to amend. Delay may count against the applicant because the Overriding Objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment - see Martin v Microgen Wealth Management Systems Ltd EAT 0505/06. However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings. This is confirmed in the Presidential Guidance on General Case Management for England and Wales (13 March 2014).

25. The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in Ladbrokes Racing Ltd v Traynor EATS 0067/06: the Tribunal will need to consider: (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

26. 4 - The Merits of the Claim: It may be appropriate to consider whether the claim, as amended, has reasonable prospects of success. In Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06, one of the reasons the EAT gave for upholding the Tribunal's decision to refuse the application to amend was that it would have required further factual matters to be investigated "if this new and implausible case was to get off the ground". However, Tribunals should proceed with caution because it may not be clear from the pleadings what the merits of the new claim are: the EAT observed in Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12 that there is no point in allowing an amendment to add an utterly hopeless case, but otherwise it should be assumed that the case is arguable.

27. In Vaughan v Modality Partnership UKEAT 0147/20, the EAT confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The factors identified in Selkent are not a tick box exercise, they are the kind of factors likely to be relevant in striking the balance. The EAT said that representatives would be

well advised to start by considering what the real practical consequences would be of allowing or refusing the amendment, if the application is refused how severe would the consequences be and if permitted what are the practical problems in responding. This requires a focus on reality, rather than assumptions. Where the prejudice of allowing the amendment is additional cost, consideration should be given as to whether it can be ameliorated by an award of costs, provided the paying party can meet it.

28. Langstaff P made the following observations in Chandhok v Tirkey [2015] IRLR 195 EAT from paragraph 16: "The claim, as set out in the ET1, is not something 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. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning … the claim as set out in the ET1. [17] … If a claim or a case is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendment; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in light of the identification resolving, the central issues in dispute. [18] In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverting into thinking that the essential case is to be found elsewhere than in the pleadings."

Judgment

29. Applying these legal principles above to the current application, I find as follows. The Claimant has been legally represented throughout the claim and specifically pleaded 7 allegations of detriment. Although there are

references in the grounds of claim to being unable to attend work and that the Claimant was told that she must attend work in the absence of a government or GP letter, the question of homeworking was not addressed specifically within it. The application is to include a new factual allegation to an existing cause of action.

30. In terms of hardship and prejudice to the parties, if the application was not granted the Claimant would be unable to rely upon the allegation, although as the Respondent submits the Claimant could still rely upon the facts as part of the background to the claim. The hardship to the Respondent is limited. The claim is at an early stage and it has yet to file its amended response. There is no suggestion that evidence has been lost or that witnesses are not available or that if included it would involve any further witnesses than those already envisaged. The claim has been listed for a final hearing in March 2022 and if the application is granted that hearing would not be in jeopardy.

31. As identified in Vaughan v Modality Partnership, the core test is the balance of hardship and injustice. The ability to undertake homeworking is likely to form part of the evidence heard in any event and it is likely to be considered when the allegations regarding the instructions to attend work are considered. Although not specially referred to, the question of homeworking is, to a small extent, implied in the claim. The Respondent acknowledged the question of homeworking was raised by the Claimant's partner and at the grievance meeting. Accordingly, it is an issue of which it has had a small amount of notice. Although, I took into account the Judgment in Chandhok v Tirkey, and that the claim as set out in the claim form is not something to set the ball rolling and the issue sought to be included was not specifically canvassed within it.

32. The extension of time limits for detriment claims is based upon reasonable practicability. The allegation is a new allegation of detriment and is not specifically referred to as a fact in the case, however the cause of action has always been part of the case. Time was something which should properly be taken into account. The Claimant did not provide an explanation as to why the application was not canvassed until the Case Management Preliminary Hearing and it is notable that the doctrine of relation back does not apply to the Employment Tribunal. There does not appear to be a prima facie case put forward as to why it was not reasonably practicable to have included the allegation in the claim form, particularly in the light of her being legally represented throughout.

33. It was significant that the issue of homeworking is likely to form part of the background in the case. The most significant factor in favour of the Respondent relates to time limits and the lack of a prima facie reason as to why it was not reasonably practicable to include the allegation in the original

grounds of claim. Given the early stage in proceedings, that the issue was raised by the Claimant's partner and during the grievance process and that it does not appear to put the final hearing or its timetable in jeopardy, the balance of hardship falls in the Claimant's favour. The prejudice to the Respondent can be met by it being permitted to argue that the allegation was not presented in time at the final hearing. The application is therefore granted subject to the Respondent having permission to make such arguments at the final hearing, which it should set out in its amended response.

Employment Judge J Bax
Date: 7 June 2021

Judgment sent to the parties: 17 June 2021

FOR THE TRIBUNAL OFFICE