



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Ms Lalosakova

**Alliance Healthcare
Management Services Ltd**

PRELIMINARY HEARING

Heard at: London South Employment Tribunal

On: 30 April 2021

Before: EJ Webster

Appearances

For the Claimant: Mr Brown (Solicitor)

For the Respondent: Mr Graham (Solicitor)

JUDGMENT

1. The Claimant's application to amend her claim to include a claim for sex discrimination is allowed.

REASONS

2. The above Judgment was reached and delivery orally on 30 April 2021. The respondent's representative asked for written reasons at the hearing.
3. By a claim form submitted on 18 May 2020 the claimant brought claims of disability discrimination and unfair dismissal. By a response form dated 20 August 2020 the respondent refuted all such claims. The claimant has since withdrawn her claim for disability discrimination. That claim was formally dismissed by Judge Martin on 1 March 2021.

4. The claimant's representative, Mr Brown made an application to amend the claim by way of a written application on 26 February 2021. That application set out that the claimant wanted to include additional claims of sex discrimination. The amendment requested is as follows:

"The proposed amendment would read as follows:

The decision to dismiss the claimant on the 31st January 2020 was also an act of sex discrimination. The claimant relies on a Mr. James Tooze as her comparator. In particular, Mr. Tooze, who was employed as a Head of Operations had used a recruitment agency (Robert Walters) without going through the proper processes which his friend Abdul was involved with. Mr. Tooze was not disciplined or dismissed whereas the claimant was for an allegedly similar misconduct."

The change requested adds the underlined words above to a paragraph already in the pleadings (paragraph 20(g)).

5. Judge Martin ordered that this be dealt with at today's hearing and it was the only substantive matter for me to decide.
6. The claimant's application to amend was to allege that the decision to dismiss the claimant was also an act of sex discrimination. In submissions, Mr Brown in essence re-stated the written application already made. In summary the key points from the claimant were:
- (i) The facts relied upon were already in the pleadings
 - (ii) This was a relabelling exercise not a wholly new claim
 - (iii) The claimant, although represented at the time of submitting her original claim had not really understood the process fully
 - (iv) As soon as he was on the record on behalf of the tribunal he made an immediate application to amend the claim
 - (v) The respondent was not disadvantaged in any way by the application as it was based on facts already pleaded within the ET1.
7. The respondent refuted those claims by way of verbal submissions to me today. In summary, Mr Graham asserted the following:
- (i) that this was an entirely new claim; nowhere in the originally ET1 had the claimant raised sex discrimination as being an issue;
 - (ii) the claim was now out of time;

- (iii) the claimant had been represented when she submitted the original claim and therefore had recourse to a claim for negligence against those she had instructed.
 - (iv) the respondent would be adversely prejudiced in defending itself against the claim given that it would lead to a longer hearing and require additional witnesses.
8. Tribunals have the power to grant amendments under their broad power in rule 29 of the Tribunal Rules 2013 to make case management orders, combined with the general power in rule 41 to regulate their own procedure in the manner they consider fair, having regard to the principles contained in the overriding objective in rule 2.
9. The overriding objective set out in *rule 2* to deal with cases fairly and justly, which includes:
 - Ensuring that the parties are on an equal footing.
 - Dealing with a case in ways which are proportionate to the complexity and importance of the issues.
 - Avoiding unnecessary formality and seeking flexibility in the proceedings.
 - Avoiding delay, so far as compatible with proper consideration of the issues.
 - Saving expense.
10. I must carry out a balancing exercise which considers the balance of injustice and hardship to each party in either granting or refusing the application. The factors in *Selkent Bus Co Ltd v Moore* (which are the nature of the amendment, the applicability of time limits and the timing and manner of the application) '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.' *Vaughan v Modality Partnership* [2021] IRLR 97
11. In carrying out this balancing exercise I have also had reference to the *Presidential guidance* states that the tribunal draws a distinction between amendments that:
 - Seek to add or substitute a new claim arising out of the same facts as the original claim; and
 - Those that add a new claim entirely unconnected with the original claim.
12. The guidance provides that in order to determine whether the proposed amendment is within the scope of an existing claim or constitutes an entirely new claim, the entirety of the claim form should be considered. It notes that in some cases, the application will merely be seeking to "re-label" a set of existing facts and may not therefore be as significant an amendment as it first seems. The guidance states that where the claim form includes facts from which

such a claim can be identified, the tribunal will, as a rule, adopt a flexible approach and grant amendments that only change the nature of the remedy sought.

13. I consider that contrary to the assertion by Mr Brown, the claimant is applying to add a new claim as there is no reference whatsoever to sex discrimination in the pleadings. However it is also clear that the sex discrimination claim is based wholly on facts already pleaded as Mr Brown seeks to amend the wording solely to add the words sex discrimination and is therefore an act of relabelling existing facts. The amendment requested is specific and clear.
14. The case of *Abercrombie v Aga Rangemaster Ltd* [2013] EWCA Civ 1148, states that when considering applications to amend that arguably raise new causes of action, the Tribunal should 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.
15. I reject Mr Graham's argument therefore that the respondent is disadvantaged because it will need to call different witnesses as the different treatment between the claimant and her comparators is already cited in the original claim. The amendment sought requires no different factual issues to be considered by the parties and does not involve different areas of enquiry to the old claim.
16. Although the application to amend is out of time I consider that it is just and equitable to extend time and allow the claimant to be considered when considering the overall situation. I have considered the relevant factors including;
 - The length of and reasons for the delay.
 - The extent to which the cogency of the evidence is likely to be affected by the delay.
 - The extent to which the party sued had co-operated with any requests for information.
 - The promptness with which the claimant acted once they knew of the possibility of taking action.
 - The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

I have also considered the case of *Marshall* which states that the emphasis of my consideration should be on whether the delay has affected the ability of the tribunal to conduct a fair hearing. I have considered the case law put forward by the respondent regarding the fact that exercising my discretion that an extension ought to be the exception not the rule.

17. The claimant was represented at the relevant time – to suggest otherwise from reading the pleadings is somewhat disingenuous on the part of Mr Brown or the

claimant. However, in considering the extension of time I have thought overall about the relative prejudice to the parties in this case and the state of preparation when considering how far such an amendment would prejudice the parties.

18. In reaching my decision I consider that the application to amend was presented as soon as Mr Brown was instructed and there was a realisation that the claim was 'missing'. Neither party has done much preparation to date (save for the pleadings) so there is very little costs prejudice at this stage, the respondent has ample time to prepare an amended response that addresses the relabelling of these facts as a sex discrimination claim. As stated before I do not accept that the relabelling of these facts means that the respondent is in a position of needing to call different witnesses or evidence than it would have been to defend the unfair dismissal claim.
19. I accept that including a claim for sex discrimination does change the potential remedies available to the claimant and therefore increases the possible exposure for the respondent, however refusing the application would have more of a negative impact on the claimant than the respondent given that it would bar her from pursuing a potential cause of action. Whilst the respondent states that the answer is against her previous representatives, I was not given sufficient information to suggest that she had a cause of action against them, nor that this was sufficient to offset the prejudice against her when the prejudice against the respondent was minimal in all the circumstances.
20. Overall I have considered the real practical consequences of allowing or refusing the amendment and find that this balancing exercise means that the prejudices to the claimant in not allowing the amendment outweigh those to the respondent in all the circumstances and therefore allowing the amendment is in the interests of justice and the overriding objective. I therefore allow the claimant's application to amend.
21. Relevant preparation orders have been made in a separate Case Management Note.

Employment Judge Webster

Date: 11 May 2021

