



EMPLOYMENT TRIBUNALS

Claimant: Miss A Temple

Respondent: Maidstone and Tunbridge Wells NHS Trust

Heard at: Telephone **On:** 7/9/2021

Before: Employment Judge Wright

Representation

Claimant: In person

Respondent: Mr A Young - counsel

JUDGMENT having been sent to the parties on 10/9/2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant's application to amend her claim to include the grievance appeal outcome dated August 2018 was refused.
2. The matter was referred to in the ET1 which the claimant presented on 16/12/2018. The claimant was aware she had withdrawn her previous ET1 on 8/11/2018 and it was open to her at the preliminary hearing on 30/4/2019, when she confirmed what her allegations were, to say that she wished to refer to and include the outcome of the grievance.
3. It was not accepted that the ET1 was incomplete. Whilst it may have been a draft ET1, the sentence on page 12 does continue on page 17 and this in fact accords with the ET1 which the claimant says is the one she intended to present. It seems the respondent would have taken the issue that the allegation was out of time and was not part of a continuing act, but it did not need to do so as the claimant expressly confirmed, as recorded in the Order, she was complaining of treatment from September 2018.
4. At the hearing, the claimant said her first ET1 concerned reasonable adjustments and the grievance appeal had not taken place at the time she presented the first ET1, so it could not have been included in that claim.

The grievance outcome is a different factual scenario to that of adjustments made to shift patterns.

5. The Tribunal finds that it would have been difficult for the respondent to have objected if the claimant had said at the preliminary hearing that the grievance outcome formed part of her allegations, given that it was referred to in the ET1 presented and the grievance outcome post-dated the first ET1 (although the [draft] ET1 did not contain as much detail as the ET1 which the claimant says she intended to provide), ultimately the grievance outcome was referenced in the ET1 form she did provide. The respondent was entitled however, to accept how the claimant framed her case at the Preliminary Hearing and to proceed on that basis.
6. The claimant received the Order on the 6/6/2019 and if her confirmation to Acting Regional Employment Judge Davies was incorrect, then it was open to her to have corrected it then.
7. The claimant said the bundle was prepared containing the [draft] ET1. She prepared her witness statement on that basis. The Tribunal has not seen the witness statement to know what, if any, reference there are to the grievance outcome. As has been said many times, the claimant is entitled to refer to the history or background which has led to this claim, but her substantive allegations are those recorded by Acting Regional Employment Judge Davies.
8. The Tribunal has to consider whether it is now proportionate to allow the claimant to amend her claim and it has concluded that it is not. Through no fault of the parties, the final hearing has been postponed on two previous occasions. The final hearing was due to take place in May 2020 and the parties had prepared for that date. Evidence will have been taken from the relevant witnesses, based upon the allegations recorded in April 2019. It is now September 2021 and the final hearing is listed for January 2022. Memories will have certainly faded and it will cause prejudice to the respondent if the claim was now amended and the claimant was permitted to pursue this allegation, which is on the face of it out of time.
9. Had the claimant confirmed at the preliminary hearing in April 2019 that she wished to include the outcome of the grievance which she had referenced in the ET1 (or upon receipt of the Order), then the respondent (as it was on notice of an allegation in the ET1 in respect of the grievance) could have responded to that allegation. Even then, once the bundle was produced and the witness statements were exchanged, had the claimant raised the fact that she wished to include the grievance allegation then a different view may have been taken. There has been no explanation for the delay in making the application.
10. The Tribunal has power to grant leave to parties to amend under its general case management power in Rule 29 of the Employment Tribunal Rules of Procedure 2013. Under s 123(1) Equality Act 2010, any complaint of discrimination must be brought within three months, starting with the date the act or actions complained of took place, or such other period as the tribunal considers just and equitable.

11. A distinction can be drawn between amendments which add or substitute a new claim arising out of the same facts as the original claim and those which add a new claim which is unconnected with the original claim and therefore would extend the issues and the evidence.
12. 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 Statistics [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.
13. The EAT in Selkent, stated a number of general principles, which it said were applicable to the amendment of 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’.
14. 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: the nature of the amendment; the applicability of time limits; and the timing and manner of the application.
15. 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.
16. In Vaughan, the EAT reviewed the law and provided guidance on the correct approach to applications to amend. It was 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. It was 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’. The EAT said 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.’
17. 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.
18. On balance the Tribunal finds the injustice or the practical consequences of refusing the amendment to be greater to the respondent. The allegation relates to events in August 2018. The claimant had several opportunities

to state that she wished to rely upon this allegation and has not done so until now. The respondent has not therefore had a much earlier opportunity to gather evidence. There was no explanation why the claimant has not referred to this matter any earlier and the case has been listed for a final hearing on two previous occasions. Furthermore, a final hearing is listed for January 2022 and there is prejudice to the respondent if the claimant was now able to advance this allegation.

19. Accordingly, it is the decision of the Tribunal that the application to amend is refused. It follows therefore, that the application to include documentation relating to the grievance in the bundle is also refused as it is not material to the issues which the Tribunal will have to determine.

Employment Judge Wright

Date 30/9/2021