EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106572/2020

Preliminary Hearing held by Cloud Video Platform (CVP) on 4 June 2021

Employment Judge: P O'Donnell

Mrs K Thomson	**Claimant** **Represented by** **Mr Raymond Brown,** **Solicitor**
Dalziel Limited	**Respondent** **Represented by** **Mr Alan Philp,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

1. The Further Particulars lodged by the Claimant on 17 March 2021 should be treated as an application to amend the claim.

2. The application to amend is allowed.

3. In light of that decision, the Tribunal makes directions for the Respondent to amend their ET3 in response if so advised:-

a. If the Respondent does wish to amend their ET3 then they should make that application within 14 days of the date that this judgment was sent to the parties.

b. Within 7 days of that, the Claimant should indicate whether or not she objects to that application and, if so, the basis of any objection.

4. The Respondent's application for a deposit order is refused.

REASONS

Introduction

1. The Claimant brings a claim of constructive unfair dismissal against the Respondent, her former employer.

2. In the course of the case management process, the Claimant lodged further and better particulars of her claim. The Respondent asserted that these should be treated as an application to amend the claim and that such application should be refused. They also make an application under Rule 39 for a deposit order. The present hearing was listed to deal with these matters.

Preliminary issues

3. At the outset of the hearing, the Tribunal raised two issues on which it sought clarification as to the parties position.

4. First, the Tribunal noted that two versions of the further particulars had been lodged, one on 10 February 2021 and one of 17 March 2021. The Tribunal read the latter version as being a revised version of the former rather than being something new with the two documents requiring to be read together. In these circumstances, the Tribunal was of the view that, if it was minded to deal with the further particulars as an amendment, it is the 17 March version which would be the amendment in question.

5. Mr Brown for the Claimant confirmed that he agreed with this. He clarified that the Claimant's position is that the 17 March document is further and better particulars of the claim and, if amendment is required, then the Claimant is seeking to amend the claim in terms of the 17 March document.

6. For the Respondent, Mr Philp said that he did not agree and that there were significant differences between the two documents which are highlighted in his written submissions.

7. The Tribunal had some difficulty in following the Respondent's position on this point. It was not clear what the Respondent said was the amendment that the Tribunal had to consider and specifically why the Respondent did not agree that the 17 March particulars were the amendment. In the Tribunal's view, it is for the party making the application to amend (in this case, that would be the Claimant) to identify the terms of the amendment and Mr Brown had identified the March document as being the amendment the Claimant sought to make. In these circumstances, the Tribunal proceeded on the basis that, if it was of the view that amendment was required, the terms of the amendment which was the subject of the Tribunal's consideration was the March particulars.

8. The Tribunal should be clear that it did not discount the February particulars as being irrelevant; the Tribunal did proceed on the basis that the fact that there was an early version of the particulars was potentially relevant to the issues which it had to address in exercising its discretion.

9. The second issue which was canvassed with parties was the order in which the Tribunal should deal with the issues. The Tribunal considered that the correct order was to deal with the amendment issue first and then consider the application for a deposit order once there was clarity as to the basis of the claim being advanced. Both parties agreed that this was the appropriate order to deal with the issues.

10. The Tribunal did not hear any witness evidence and the hearing proceeded on the basis of submissions.

11. There was an agreed bundle of documents prepared by the parties for use at the hearing. This bundle consisted of what can be described as the "process" being made up of the pleadings, Notes of the previous case management hearings, the further particulars lodged by the Claimant etc. A reference to page numbers in this judgment is a reference to the page in the bundle.

Procedural history

12. The Tribunal considers that a brief summary of the procedural history of this case would assist in putting the present hearing in context.

13. The ET1 was lodged on 22 October 2020 (pp1-12) with the ET3 being submitted on 17 November 2020 (pp13-24).

14. A case management preliminary hearing was listed for 8 January 2021. In advance of that hearing, the Respondent lodged their case management agenda (pp25-31) which, amongst other matters, identified a number of further particulars that the Respondent sought from the Claimant in order that they had fair notice of the claim.

15. At the hearing on 8 January, Mr Brown accepted that the claim required some further particularisation and a direction was made by the Tribunal for the Claimant to provide the further particulars sought by the Respondent in their case management agenda. The Note of the hearing at pp36-40 records this at paragraph 6.

16. The Claimant lodged further particulars in response to this direction on 10 February 2021 (pp41-45).

17. A further case management hearing was listed for 10 March 2021. In advance of that hearing, the Respondent lodged a further case management agenda which asserted that the further particulars at pp41-45 did not wholly meet the direction made at the January hearing.

18. The Note of the March hearing (pp62-67) records Mr Brown, on behalf of the Claimant, accepting that the February particulars had missed certain matters in error and he provided the information sought orally at the hearing

(paragraph 4 at p63). The Tribunal directed him to provide the missing information in writing within 7 days.

19. At the same hearing, the Respondent's agent raised the issue that the further particulars should be treated as an application to amend the claim and that such application should be refused. An application was also made by the Respondent for the claim to be struck-out failing which for a deposit order.

20. The present hearing was listed at the March hearing to deal with these issues and directions were made for preparation for the hearing.

21. The Respondent subsequently confirmed that they did not insist on the strike-out application.

Respondent's submissions

22. The Respondent's agent produced written submissions and supplemented these orally.

23. The written submissions begin by setting out a summary of the history of the claim. It sets out the factual averments in the Claimant's further particulars which the Respondent says are new allegations not foreshadowed in the original ET1. After consideration, the Respondent says that Points 1-3, 6-7, 12 and 14(1) are new allegations. The Respondent also submits that the Claimant has sought to allege a "final straw" which is not foreshadowed in the ET1.

24. The written submissions go on to set out the relevant law in relation to both the issue of amendment and the application for deposit order.

25. Turning to the issue of the amendment, the submissions start by accepting that the legal claim (that is, constructive unfair dismissal) remains the same and, therefore, the issue of time limits does not arise.

26. Reference is made to the Presidential Guidance from January 2018 and the need to view the entirety of the claim form in considering whether a proposed amendment is within the scope of the existing claim.

27. The submissions then set out the Respondent's position on the content of the ET1 as originally presented. It is said that it is set out in general terms, alleging bullying and unfair treatment by the Claimant's manager but without many specific allegations. The specific allegations are listed. It is also said that there are few dates given in the ET1 with January 2020 being mentioned in relation to a rejected holiday request and April 2020 which related to a seating request. This last date related to a claim of a sex discrimination claim that was withdrawn.

28. It was submitted that, from the way in which the ET1 is worded, a reasonable conclusion is that the issue of the seating request was the last straw giving rise to the Claimant's resignation. No other matter is described as being the last straw.

29. The written submissions then turn to the terms of the February and March particulars. It focuses on the matters in the further particulars which the Respondent says were not foreshadowed in the ET1 and sets out the basis on which it is said that these matters were not part of the claim pled in the ET1. For the sake of brevity, the Tribunal does not intend to set out the full detail. It does, however, note that the Respondent asserts that these issues were not raised with them by the Claimant at the time of the alleged incidents, that these do not fall within the scope of what is said in the ET1 and that these matters are raised for the first time in the further particulars.

30. In particular, the Respondent submits that the Claimant had raised an entirely new matter as being the "final straw" at Point 16 of the March particulars that was entirely new and different from that pled in the ET1. In the oral submissions made at the hearing, Mr Philp went further and submitted that the February particulars raised a different "final straw" from the ET1 and that the March particulars then change this again.

31. It was submitted that it was clear that the amendments were not a mere clerical error or relabelling but rather an amendment raising entirely new factual allegations.

32. The written submissions then turned to the issue of the timing and manner of the application. They set out the case management process which led to the present hearing. Again, the Tribunal will not set this out in full for the sake of brevity.

33. One point which the Tribunal does highlight, because it relates to a point emphasised by Mr Philp at the hearing, is the submission that the "final straw' set out in the March particulars is different from that in the February particulars. It is submitted that neither matter is capable of being a "final straw" (applying the relevant authorities on that point) based on what is pled in the ET1. Rather, it is said, these are an attempt by the Claimant to address matters raised in the ET3 regarding affirmation of the contract and amount to a "*second bite at the legal cherry*".

34. Reference is made to the ET1 not including any allegations involving some of the specific words used in the further particulars such as "lying", "glaring" and "intimidation".

35. It is submitted that a salient point is that the Claimant does not accept that these particulars amount to an amendment and that all of the allegations are to be found in the ET1. This is not accepted by the Respondent.

36. The written submissions then address the fact that the Claimant has had legal representation throughout the history of the case. It is said that this is not a case of a party litigant who did not understand the need to fully specify their claim. The Respondent is entitled to believe that a legal representative would properly and fully specify the claim in order for fair notice to be given.

37. In this case, it is submitted that the ET1 is vague and generalised and the Claimant now seeks to take advantage of this in seeking to argue that the further particulars fall within the scope of the original claim. It is submitted that the Claimant should be required to satisfy the Tribunal that the further particulars are clearly foreshadowed in the ET1. The lack of specification should be held against the Claimant rather than assist her.

38. Finally, in relation to the amendment issue, the written submissions turn to the matter of prejudice and it is submitted that the Respondent would face the following hardship and injustice:-

    a. They will have to deal with additional complaints.

    b. Some of these complaints go back over two years and there is a question of whether a fair trial is possible. The passage of time can affect the ability of witnesses to recall events, particularly as it was the Claimant's position that she did not raise formal grievances about these matters at the time.

    c. It will unreasonably increase the preparation time and costs.

    d. It will affect the length of the final hearing given that additional witnesses will be required as identified at pp50-51.

39. It was submitted that the Claimant will not be prejudiced or caused any hardship if the amendments are refused as she can proceed with her claim as pled in the ET1. No prospective claim is lost, just certain factual averments.

40. In these circumstances, it is submitted that the Tribunal should recognise the new factual averments as amendments and that the Tribunal should reject these amendments.

41. Turning to the application for a deposit order, the written submissions set out the following matters:-

    a. The Claimant did not submit any written grievance or written complaint of any sort against her manager.

    b. The Claimant has been unable to produce any holiday request relating to the alleged refusal of same.

c. Many of the allegations relate to the Claimant's perceptions and subjective opinions about how she was treated rather than demonstrable breaches of contract.

d. Some of the allegations are so vague that the Tribunal could not make findings of fact to support the claim. An example is given of the allegation relating to the refusal of a holiday request which does not specify who was treated differently from the Claimant.

e. The claim is advanced as a last straw case and so the Claimant has to satisfy the Tribunal that all, or sufficient, of her allegations amounted, or contributed, to a material breach of contract.

f. The last straw, no matter whether it is that pled in the ET1 or in the further particulars, is not capable of contributing to a breach of contract.

g. In the absence of a grievance from the Claimant, the Tribunal is entitled to conclude that the Claimant has affirmed the contract.

h. The claim is concerned with whether what the Respondent did, or did not, do amounts to a breach of contract and not what the Claimant felt about it.

42. It was submitted that the Tribunal is entitled to doubt the likelihood of success in this claim and should make an Order for the Claimant to pay a deposit of £1000 to proceed with the claim.

43. In his oral submissions, Mr Philp supplemented the written submissions in relation to the deposit order. He drew the Tribunal's attention to the fact that the ET1, February particulars and March particulars amount to 3 sets of pleadings. He then took the Tribunal to what he considered were the relevant parts of those documents at pp12, 41-45 and 68-74 that highlighted that the claim was based on the Claimant's feelings and not actual breach of contract.

44. He also emphasised that there had not been a single written grievance over the whole period of the complaint.

45. Reference was made to the case of *van Rensburg* and it was submitted that the claim was about the Claimant's feelings rather than the Respondent breaching the contract.

46. In these circumstances, it was submitted that the Tribunal was entitled to doubt that the Claimant will succeed.

47. Mr Philp then commented on matters arising from the Claimant's submissions which he wished to address.

48. He noted that it was accepted that allegations now being made were not specified in the ET1. However, he fundamentally disagreed with any submission that these fall within the scope of the ET1. The purpose of the ET Rules is that the Respondent should have fair notice of the case they have to meet and was not intended as means of allowing parties to add what is not in the ET1. In effect, the Claimant is submitting that they can be as vague as they like and cure this with further particulars. The purpose of pleadings is to set out the case and the Respondent then replies to that. This avoids the "*shifting sands of litigation*" warned against in the case of *Chandol*.

49. It was submitted that it is not within the Overriding Objective to spend time finding out the detail of the claim. This only causes delay.

50. The Claimant has had three bites of the cherry and has been represented throughout the case. There is an obligation to plead the case.

51. Mr Philp did not agree that there was only a short period to deal with the case. The Claimant had three months from her resignation to seek advice and lodge her claim. He questioned when the Claimant's agent was instructed and submitted that this was a relevant factor.

52. The oral submissions then picked up the point from the written submissions relating to the assertion that the Claimant has advanced three different "final straws" and highlighted what were said to be the relevant extracts from the ET1 and subsequent particulars. This was said to be the "*shifting sands of litigation*" which are to be avoided.

53. Mr Philp did not agree with any suggestion that these are matters of evidence. It is a matter of fair notice and fair hearing.

54. In relation to the issue of prejudice, it is submitted that the Claimant ignores three matters in suggesting there is no prejudice to the Respondent:-

a. The time point is not insignificant. Matters going back several years are being raised for the first time in February 2021 with the Claimant not having raised a grievance at the time. It was submitted that witnesses cannot be expected to recall matters.

b. The amendments will lead to a longer hearing given that the Respondent has identified three additional witnesses which would add at least a day to the final hearing.

c. The Claimant is not prevented from advancing her claim; the Respondent does not challenge certain of the particulars.

55. It was accepted that there was some mention of a pay issue in the ET1 but the issue of refusal of a pay rise was not raised until the March particulars and there was no reference to this previously despite the Claimant considering it to be important.

56. Returning to the issue of the deposit order, Mr Philp disagreed that it was a matter of evidence; it was a matter of fair notice. The claim was based on the Claimant's subjective view of the Respondent conduct and not breach of contract. The "final straw" must be capable of adding something; it was said to be not the fact that the Claimant was refused a pay rise but the dismissive nature of the refusal that was the final straw. However, it was submitted that any refusal is dismissive by its very nature.

57. In rebuttal of matters raised orally by Mr Brown, Mr Philp made the following submissions:-

a. *Selkent* identifies 3 types of amendment and this can include alleging new facts. The issue of prejudice still applies in such an amendment and the only difference is the applicability of time bar.

b. It was still not clear, given when the Claimant's agent was instructed and the ACAS Early Conciliation Certificate was issue, why the claim could not have been pled in full by October 2020 when the time limit expired.

c. The first paragraph of the ET1 is so general that it could mean everything and nothing; none of the further particulars are foreshadowed in this; specific allegations need to be pled; the point of pleadings is to give notice.

d. The issue of Legal Aid is not relevant to timing.

e. In terms of additional work, the example of the holiday request is given and it was submitted that the lack of specification means that the Respondent needs to check with everyone to see if their holidays were granted.

Claimant's submissions

58. Mr Brown adopted the written submissions lodged on behalf of the Claimant.

59. Those written submissions start with the proposition that pleadings in the Employment Tribunal are not designed to plead evidence or be overly legalistic. Rather, the purpose of the pleadings is to give the Respondent notice of the claim in the context of the short period in which claims are to be lodged in the Tribunal. It is for this reason that the Tribunal rules provide for further and better particulars.

60. It is submitted that the ET1 is clear; the specific allegations in paragraphs 2 and 3 does not prejudice the generality in paragraph 1. The Tribunal should apply a fair reading to the whole of the ET1.

61. The submissions go on to say that the further particulars specify the manner in which the Respondent acted in greater detail. There is an acceptance that many of the allegations do not appear specifically in the ET1 but, it is submitted, this is the nature of further specification.

62. Any suggestion by the Respondent that new factual allegations should not be allowed is resisted by the Claimant. It is submitted that paragraph 1 of the ET1 is wide in its terms and it is not appropriate to overly analyse ever sentence in the particulars to compare it with the sentences in the ET1.

63. The written submissions point out that the terms of the ET3 (pp19-24) shows that they had been able to investigate matters based on what is pled in the ET1 and this suggests that little or no prejudice would be faced by the Respondent in doing the same if the amendment is allowed.

64. The Claimant's case is set out in the particulars at pp68-74 and this is a matter of evidence.

65. The submissions by the Respondent at paragraph 5.18 of their written submissions is then addressed. It is said that the Claimant had asserted that she was subject to unreasonable behaviour in the ET1 and the further particulars, where they use terms such as "lying", "lack of support" or "glaring or intimidation", are specific examples of the unreasonable behaviour. The Respondent had requested specification of this behaviour and that is what has been provided. The fact that the words used in the particulars were not used in the ET1 is, it is submitted, of little consequence.

66. Turning to the issue of the last straw, the written submissions state that the Claimant's position on this is set out at pp73-74 and this is a matter of evidence. The Respondent's interpretation of this is unreasonable and there is no inconsistency in the different versions of the particulars. If there is then this is a matter on which the Respondent can cross-examine the Claimant.

67. It is submitted that, although the Respondent makes reference to foreshadowing, what it relevant if whether notice has been given to the Respondent and it has.

68. There would be little or no prejudice to the Respondent in allowing the amendment; the Respondent has been able to answer the claim in the ET3 and it is difficult to see how the time period would cause any significant prejudice to the Respondent whereas there would be significantly greater prejudice to the Claimant in not being allowed to plead her case.

69. Further, it was submitted that there would be little increase in the preparation time and cost given the substance of the ET3 and the fact that the Respondent sought further particulars.

70. Turning to the application for a deposit order, the written submissions assert that, taken together, it cannot be said that the allegations have little reasonable prospects of success.

71. It is submitted that it is not correct to characterise the allegations as being solely the Claimant's perceptions. Rather, it is said that they are averments of fact that, if taken together, would allow a Tribunal to conclude that there had been a breach of trust and confidence.

72. The allegations as a whole are not vague. The "final straw" is not, as characterised by the Respondent, simply a refusal of a pay rise. It is to be viewed in the context of the averments about the conduct of the Claimant's manager towards her and not just taken in isolation.

73. It is submitted that the lack of a written contract does not, on its own, allow the Tribunal to conclude that there has been affirmation. It fails to take account of the fact that the Claimant complained verbally.

74. Mr Brown began his oral submissions by making a number of preliminary comments about the issue of amendment; the March particulars are a further specification of a cause of action averred in the ET1; it is a formality to say that the Claimant wants to amend to provide this specification; the Claimant is not amending the cause of action; these are factual averments which have a basis in the ET1 although he did accept that the reference to Ms Love at p68 has no particular connection to what is pled in the ET1.

75. Mr Brown did not agree with the assertion in the Respondent's submissions that the further particulars are not foreshadowed in the ET1. He gives the example of paragraph 5.11 of the Respondent's submissions which he submitted did fall within the wide terms of paragraph 1 of the ET1 at p12; this asserts bullying and unreasonable behaviour and it is submitted that this is capable of encompassing the allegations which paragraph 5.11 criticises.

76. He went on to submit that all the examples given by the Respondent in their submissions are flawed given what is said at paragraph 1 of the ET1 which sets out the clear basis of the claim with specification given in the particulars.

77. It was submitted that pleadings are not intended to plead evidence, they are to give fair notice. In this case, the basis of the claim is that the Claimant was treated badly giving rise to a breach of trust and confidence. The particulars are just specification of that claim.

78. Mr Brown then went on to set out the reasons for the specification coming as it had. He explained that his firm was first contacted by the Claimant in August 2020. At this time, the restrictions caused by the pandemic meant everything was being done remotely; he set out the sequence of events in which he received instructions from the Claimant and the steps taken in progressing the claim including seeking Legal Aid and extensions of it to carry out each step. Being conscious of time limits, the Claimant had been advised to engage ACAS Early Conciliation. The ET1 was lodged based on the instructions given at the time but it had been difficult to get factual clarity in the timescales involved and when working on a remote basis. It was submitted that specification was given in reasonably short compass.

79. It was noted that the Respondent had been able to lodge a robust ET3 and comment on the amendments. This indicated, it was said, that there was no significant prejudice to the Respondent.

80. Mr Brown noted that the Respondent's attack is that subjective assertions are being made. It was submitted that this is a matter of evidence and there is an averment of what occurred in each instance. In any event, how the

Claimant feels is relevant; it adds flavour to what she says each conversation was and it is a matter of evidence as to how things were said. Nuances are important as to how a message is delivered. Otherwise, there would simply be a trial on the pleadings as to what the facts might be.

81. It was submitted that it is not fair to say that the particulars are the first time these allegations have been raised; the Claimant says she raised them verbally at the time. The fact that a written grievance has not been raised does not preclude the claim and the Respondent is getting close to saying that.

82. In terms of the final straw, this is set out in the March particulars and Mr Brown does not accept that there have been three changes; the ET1 does not say that the events of April 2020 are the last straw and this is not a fair reading of the ET1 when you go back to paragraph 1; at p73, the final straw has to be looked at in the context of the whole factual matrix and this is how facts led in evidence have to be considered; the overriding objective has to be considered, particularly the need to avoid formality.

83. The overall averments have to be looked at as a whole and taken at their highest; there is sufficient specification of the case which the Respondent has to meet and what they need to investigate to prepare for a full hearing. The Respondent says that the allegations are so vague that a fair trial is not possible and Mr Brown could only disagree with that on the specification given.

84. If there have been any changes to the pleadings then that is a matter of credibility for the Tribunal hearing the evidence.

85. Looking at the overriding objective, it was submitted that this case should proceed to a final hearing; there is plenty of specification and notice for the Respondent to formulate a defence.

86. In relation to the deposit order, it was submitted that the Claimant and her husband were on benefits and if they were required to pay a deposit then that

would be the end of the matter. It, therefore, becomes an issue of access to justice.

87. Mr Brown gave some information about the Claimant's means but did not have all the necessary information to hand. The Tribunal directed that a full statement of the Claimant's means should be lodged no later than 11 June 2020. This statement was lodged by that date.

88. In terms of any difference in the final straw that might exist between p63 and p73, these were the Claimant's instructions at the time and she can be cross-examined on this but it is not a reason for a deposit.

89. The fact that criticisms can be made of the Claimant's case is entirely different to what a deposit order is for.

90. Returning to the issue of amendment, Mr Brown drew a distinction between this case and the facts of *Selkent*; that was a case of a substantial alteration pleading a different case made shortly before a hearing. In this case, the ET1 may be general but it tells the Respondent the case.

91. The prejudice to the Claimant is far outweighed by the prejudice to the Respondent in having to precognose a few more witnesses or the extension of 1 day to the length of the hearing. The Claimant would have extreme difficulty in leading evidence at the hearing if the amendment is refused.

Relevant Law

92. The Tribunal has a general power to make case management orders which includes the power to allow amendments to a claim or response in terms of Rule 29.

93. The case of *Selkent Bus Co Ltd v Moore* [1996] ICR 836 confirms the Tribunal's power to amend is a matter of judicial discretion taking into account all relevant factors and balancing the injustice and hardship to both parties in either allowing or refusing the amendment. The case identifies three particular factors that the Tribunal should bear in mind when exercising this

discretion; the nature of the amendment; the applicability of any time limits; the timing and manner of the amendment.

94. In relation to time limits, the case of *Transport and General Workers Union v Safeway Stores Ltd* UKEAT/0092/07 confirms that this is a relevant factor in the Tribunal's discretion and can be the determining factor. However, time bar does not apply, in the context of an application to amend an existing claim, to automatically bar a new cause of action in the same way as it would if the new cause of action was being presented by way of a fresh ET1.

95. The case of *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650 addresses the procedure to be adopted by the Tribunal in dealing with an amendment. In that case, it was held that the claim as originally presented and as amended was the same, that is, that the claimant had been unfairly dismissed by his employer. Given that that complaint had been lodged timeously then the Tribunal had the discretion to allow an amendment that was necessary to hear that claim. In exercising such discretion, the Tribunal should proceed as follows (per Sir John Donaldson at pp656 & 657):-

1. *They should ask themselves whether the unamended originating application complied with [rule 8(1) of Schedule 1 to the 2013 Regulations]: see, in relation to home-made forms of complaint, Smith v Automobile Pty Ltd [1973] 2 All ER 1105, [1973] ICR 306.*

2. *If it did not, there is no power to amend and a new originating application must be presented.*

3. *If it did, the tribunal should ask themselves whether the unamended originating application was presented to the [tribunal] within the time limit appropriate to the type of claim being put forward in the amended application.*

4. *If it was not the tribunal have no power to allow the proposed amendment.*

5. *If it was the tribunal have a discretion whether or not to allow the amendment.*

6. *In deciding whether or not to exercise their discretion to allow an amendment which will add or substitute a new party, the tribunal should only do so if they are satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause reasonable doubt as to the identity of the person intending to claim or, as the case may be, to be claimed against.*

7. *In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused.*

96. The Tribunal has the power to make a deposit order under Rule 39:-

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

97. In *Hemdan v Ishmail* [2017] IRLR 228, it was confirmed that the purpose of the rule was to identify claims with little prospect of success at an early stage and discourage those but was not intended to act as a barrier to access to justice or to "*strike-out by the back door*".

98. In determining an application for a deposit order, the Tribunal is entitled to have regard to the prospects of any party making out any factual assertion on which the claim is based as well as purely legal issues (*Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07). However, the Tribunal "*must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response*" (*Van Rensburg* para

27) although this should not involve a trial of the facts as this would defeat the purpose of the Rule (*Hemdan*).

Decision - Amendment

99. The first issue for the Tribunal is to decide whether or not the further particulars lodged on 10 March 2021 require to be treated as an application to amend.

100. An important factor in considering that issue is the nature of the further particulars. It is certainly not the case, and this was common ground between the parties, that the further particulars raise a new cause of action either from entirely new factual averments or a new cause of action from the existing averments. If they had, the Tribunal would have little hesitation in treating the particulars as an application to amend.

101. Equally, these are not further particulars which provide further specification of minor issues such as the precise date of a particular incident or clarification of an ambiguous averment where the need to avoid formality required by the overriding objective would mean that amendment would unlikely to be required.

102. Rather, they sit somewhere in the middle in that, although they do not raise a new cause of action or fundamentally alter the claim being advanced (that is, that the Claimant was constructively dismissed due to a breach of the fundamental term of trust and confidence and such dismissal was unfair), they do set out the facts which the Claimant is offering to prove in more detail than the original ET1 and do include matters which are not expressly pled in the ET1.

103. The Tribunal considers that there is very little inherent prejudice to the Claimant in treating the particulars as an amendment; she has been able, through her agent, to make submissions regarding amendment and the Respondent does not object to all the particulars being added by way of amendment. Indeed, the Tribunal considers that there is a benefit to the

Claimant, the Respondent and the Tribunal to deal with these as an amendment as it puts the particulars on a clear footing and removes any question as to their status in these proceedings.

104. In these circumstances, the Tribunal finds that the balance in treating the particulars as an amendment against the need to avoid formality tips in the favour of the former particularly taking account of the fact that doing so clarifies the status of those particulars.

105. Having come to the view that the particulars should be treated as an application to amend, the Tribunal turns to the question of whether such an application should be allowed.

106. The Tribunal considers that it is appropriate to address each of the specific factors highlighted in *Selkent*, consider any other relevant factors and then take all of those into account in balancing the injustice and hardship to all sides.

107. First, there is the nature of the amendment itself. As set out above, this is not an amendment which seeks to add a new cause of action either by way of new factual averments or from the existing facts. Rather, it is one which seeks to specify the existing claim.

108. A relevant consideration for the Tribunal is the degree to which the amendment alters the claim being advanced. The Tribunal agrees, to some extent, with the proposition being advanced by Mr Philp that there can be cases where an amendment providing further specification can fundamentally change the nature of the claim being advanced even if the legal cause of action remains the same.

109. However, this is not such a case. The claim advanced in the ET1 is that the Claimant resigned because of a breach of the fundamental term of trust and confidence giving rise to a constructive dismissal (properly, it is dismissal as defined in s95(1)(c) of the Employment Rights Act 1996 but the Tribunal will use the phrase “constructive dismissal” to describe this as it is a commonly used shorthand description of this type of dismissal). The breach of trust and

confidence is said to arise from the conduct of the Claimant's manager which is described in broad terms using terms such as "bullying", "unreasonable behaviour" and "belittling and demeaning comments" at paragraph 1 of the Paper Apart (p12).

110. The further particulars, with one small exception, set out the detail of the alleged conduct of the Claimant's manager and the Tribunal considers that all of the alleged conduct is capable of falling into the description of the manager's conduct in the ET1. The approach urged by the Respondent's agent is, in the Tribunal's view, overly formal and legalistic in suggesting that the Tribunal should look for the same words in both documents in considering whether the further particulars are within the scope of the claim pled in the ET1.

111. The one exception are the averments in the further particulars relating to the conduct of another employee. These are entirely new and do not, on even the most generous reading of the ET1, fall within the scope of the claim pled in the ET1.

112. The Respondent's submissions did place emphasis on the amendment seeking to change the "final straw" relied on by the Claimant; it was submitted that this was pled as the change in the seating arrangements in the ET1 and was now said to be the manner in which the Claimant's request for a pay rise was refused.

113. The Tribunal does not read the ET1 in the way urged by the Respondent; it is correct that the description of the change of seating arrangement precedes the averment relating to the Claimant's resignation but that description sets out the basis of the sex discrimination claim which was subsequently withdrawn and there is no express link between that and the subsequent averment. The Respondent certainly did not consider that the final straw was clearly pled at the point they lodged their first case management agenda as they sought clarification of what the "final straw" was said to be.

114. The Tribunal did see some force in the submissions by Mr Philp regarding pleadings being overly vague and a claimant being able to take advantage of this. However, the Tribunal did not consider this to be such a case and, in any event, where pleadings are vague the appropriate course is for the relevant party to be ordered to provide specification in order that they "pin their colours to the mast". This is exactly what the Respondent sought in this case and what the Claimant has provided.

115. In this regard, the nature of the amendment is one that seeks to provide further specification of the claim pled in the ET1 and, with one exception, are averments which fall within the scope of the claim pled and does not fundamentally alter the claim.

116. Second, there is the issue of the applicability of time limits. Given the nature of the amendment, the Tribunal does not consider that time limits are applicable and both parties agreed they are not.

117. Third, there is the factor as to the timing and manner of the application. The Tribunal notes that the issue of further specification arose at the very early stages of the claim and was addressed at the first case management hearing. Although it took the Claimant two attempts, she has provided the specification very early in the Tribunal process and this is not a case where the Claimant is seeking to make an amendment shortly before the final hearing or at a late stage. Indeed, the final hearing in this case has not yet been listed.

118. The Tribunal does note that there have been two versions of the further particulars. This arose because the February version did not address all of the Calls which the Tribunal had directed the Claimant to answer. However, the Tribunal did not consider that this was a particularly relevant factor; the Respondent's position that the particulars should be treated as an amendment and that such amendment should be refused was raised in relation to the February particulars (as was the application for a deposit order) and so the present hearing was always going to be required. There was no delay caused by the March version being lodged.

119. Having addressed the specific factors identified in *Selkent*, the Tribunal considered whether there were any other relevant factors.

120. The Respondent made submissions about the fact that the Claimant had been legally represented throughout the process. It is true that the Tribunal will often give a party litigant or lay representative more leeway and would not hold them to the same understanding of the process which they might of a qualified lawyer.

121. The Tribunal, however, is not aware of any authority, and the Respondent's submissions did not take the Tribunal to any authority, that says that a party should, in effect, be penalised in the consideration of an amendment application because they have a legally qualified representative and so any pleadings should not require amendment.

122. In saying that, the Tribunal is not suggesting that legal representatives are free to plead a claim in vague terms and always be able to escape the consequences of that. There may be a number of scenarios where, for example, a representative has missed a potential cause of action and the fact that they are a qualified lawyer would be relevant to the issue of the applicability of time limits and the power to hear claims out of time. Further, qualified lawyers are required by the overriding objective to assist the Tribunal in achieving that objective as officers of the court and this would include avoiding the issues caused by excessively vague pleadings.

123. However, this is not such a case; the pleadings are not excessively vague and the Tribunal notes that the Respondent was able to lodge a full ET3 in response to the ET1; it was a case where, as Mr Brown fairly accepted, some specification was required but it is not one where the Respondent had no notice of the claim against them.

124. Further, the Tribunal was not in a position to assess the extent to which any lack of specification was due to a failing on the part of the Claimant's agent or the extent to which it was due to the instructions which the Claimant had

provided at the relevant times. The Tribunal heard no evidence at this hearing and, in any event, these are matters which are legally privileged.

125. There was some suggestion in the Respondent's submissions, arising from the criticisms of the multiple versions of the particulars, that the Respondent did not have fair notice of the claim they had to meet or that the Claimant may seek to shift the basis of her claim further at some later stage. The Tribunal does not agree; the Respondent has been given specification of the case which the Claimant offers to prove and the Tribunal observes that the Respondent has not sought any further specification of the claim; the fact that the Claimant may (or may not) seek to alter the basis of her claim at some later date is not a reason to refuse the present application and if the Claimant did seek to do so then that can be addressed if it occurs.

126. Turning to the balance of injustice and hardship between the parties, the Tribunal notes what is said by the Respondent's agent regarding the additional work which requires to be undertaken and the fact that any hearing is likely to require to be longer. Mr Brown did not shy away from those consequences (although he said that they did not outweigh the prejudice to the Claimant) and the Tribunal agrees that these are inevitable consequences of the more particularised claim.

127. The Tribunal does not wholly agree with the submission that the Respondent is facing "additional complaints". It is correct that they are facing a claim involving more detailed averments if the amendment is allowed but they would not be facing any additional causes of action or additional liability from that pled in the ET1.

128. However, this has to be balanced against the benefit to the Respondent in having the full specification of the claim they have to meet. The Tribunal agrees with the submission by the Claimant that the general rule is that you do not plead evidence and had the case proceeded to a hearing without the specification that has been provided then the Claimant would likely have led evidence for which the Respondent had no advance notice. Parties are now

in a position where the Claimant has set out her case and the Respondent knows what they face.

129. The Tribunal notes the comments about the passage of time and the impact this would have on the recollection of witnesses and recognises the difficulties this can cause. To some extent, this is a problem which arises in all litigation and is not something which arises only from the amendment; had the claim been pled in the same terms as the March particulars in the ET1 as lodged then the same issue would have arisen; other areas of civil litigation involve significantly longer time limits than the Tribunal and so inevitably require witnesses to recall events from some time ago.

130. However, the Tribunal notes that there is no suggestion by the Respondent that they face insurmountable difficulties arising from the passage of time. They do not, for example, suggest that relevant witnesses have left the Respondent and cannot be traced or that relevant documents have been lost or destroyed.

131. Further, the Respondent has been able to produce a revised ET3 (pp54-61) and does not appear to have been disadvantaged in this.

132. Turning to the prejudice to the Claimant, the Tribunal agrees with the submission by Mr Philp that the Claimant is not precluded from advancing her claim if the amendment is not allowed. This is very different from a case where the amendment being refused would effectively bring the claim to an end or that the Claimant might be precluded from advancing a particular cause of action.

133. However, that is not the end of the matter. If the amendment is not allowed then the Tribunal considers that the Claimant would be disadvantaged in advancing her claim; the Tribunal can well envisage that the Claimant would, in answers to questions asked in chief or cross-examination, seek to make reference to the factual averments in the further particulars, even if only as background evidence, and would then face objections to such evidence being given because it does not form part of her claim.

134. Even if the Tribunal hearing the evidence allowed those matters to be given in evidence, this would lead to a "stop/start" process, disrupting the flow of the Claimant's evidence and leading to delays in the hearing.

135. The Tribunal considers that, although there may be some injustice and hardship to the Respondent in allowing the amendment (that is, the increased preparation and length of hearing as well as the difficulties with the recollection of witnesses), this does not outweigh the hardship and injustice to the Claimant in refusing it given the potential impact on the ability of the Claimant to advance her claim.

136. In these circumstances, taking account of all the matters set out above, the Tribunal allows the application. In particular, given that the amendment does not raise any new cause of action but only provides specification of the existing claim, the fact that it is made early in the process and the balance of prejudice, the Tribunal considers that it is in the interests of justice and in keeping with the overriding objective for the amendment to be allowed.

137. In light of that decision, the Tribunal considers that it is appropriate to make directions for the Respondent to amend their ET3 if so advised:-

    a. If the Respondent does wish to amend their ET3 then they should make that application within 14 days of the date that this judgment was sent to the parties.

    b. Within 7 days of that, the Claimant should indicate whether or not she objects to that application and, if so, the basis of any objection.

Decision – Deposit

138. The Tribunal proceeds to determine this application by considering the claim as amended by the March particulars given its decision on amendment.

139. The Tribunal notes that there is a significant dispute of fact between the Claimant and the Respondent's witnesses which will require to be resolved

by the Tribunal hearing the evidence. The Tribunal cautions itself against carrying out a "mini-trial" on the basis of the pleadings.

140. What can be said is there is nothing on the face of the information available to the Tribunal that suggests that the Claimant will fail to make out any of the factual averments or that any dispute of fact will obviously be resolved in the favour of the Respondent.

141. The Respondent places great reliance on the lack of a grievance from the Claimant prior to her resignation. However, this is not inherently fatal to the claim and the Tribunal is not aware of any authority that there cannot be a fundamental breach of contract simply because the Claimant has not grieved about the conduct said to give rise to the breach. The question for the Tribunal is whether the Respondent has acted, without reasonable cause, in a manner which is designed or likely to destroy trust and confidence.

142. The submissions for the Respondent go further and say that the lack of a grievance entitles the Tribunal to conclude that the Claimant affirmed the contract. Whilst the lack of a grievance is relevant evidence for the Tribunal to take into account in assessing the issue of affirmation, it does not mean that the Tribunal must, or even will, reach such a conclusion. The Tribunal requires to take into account all relevant facts which include not just whether the Claimant grieved but also the passage of time between the "last straw" and resignation and what actions the Claimant took during such time that indicated that they either did or did not intend to continue to be bound by the contract.

143. Similarly, the Tribunal does not consider that the fact that the Claimant could not produce a written holiday request has the significance which the Respondent suggests it does in their submissions. It will be a matter of evidence for the Tribunal to resolve any dispute about what happened in relation to the Claimant's holiday request having heard evidence from the relevant witnesses.

144. The Tribunal considers that the criticisms of the allegations being only the Claimant's perceptions and subjective opinions rather than demonstrable allegations of breach of contract is not something from which it could conclude that the claim as little reasonable prospects for two reasons.

145. First, the Tribunal does not consider that the Claimant requires to show that each allegation is a demonstrable breach of contract and the submission by the Respondent is not a correct statement of the law. This is a case in which the Claimant relies on the "last straw" principle in *Lewis v Motorworld Garages Ltd* [1985] IRLR 465 and that does not require each incident to be a breach of contract so long as the incidents taken as a whole amount to a repudiatory breach of contract.

146. Second, it is not correct that the allegations solely consist of the Claimant's perceptions and subjective opinions. Whilst it is true that the Claimant avers how particular incidents made her feel or her perception of why her manager had acted in a particular way, she also avers the facts of what occurred.

147. The Tribunal agrees with the submission from the Claimant's agent that how a manager speaks to an employee can be significant in determining whether a particular comment or action is an innocuous and reasonable action by a manager or whether it is something which can contribute to the destruction or undermining of trust and confidence. The Claimant's averments about how she was made to feel or how she perceived comments were delivered are, therefore, relevant and give the Respondent notice of her case.

148. This leads to the next submission by the Respondents which is that certain allegations are so vague that the Tribunal cannot make findings of fact about them. To the extent that this submission is based on the suggestion that the allegations consist only of the Claimant's perceptions and subjective views, the Tribunal does not agree that this is all which the allegations consist of for the reasons set out above.

149. Further, the Tribunal considers that this criticism does take the Respondent close to the error of suggesting that the Claimant should have pled her

evidence. Until the Tribunal has heard all the evidence regarding, using the same example as the Respondent, the Claimant's holiday request it cannot be said what findings of fact they will make. What can be said is that the Claimant is offering to prove that others were granted holiday requests in circumstances where she was refused and there is nothing from the available information from which the Tribunal could conclude that the Claimant has little prospect of establishing the facts which she offers to prove.

150. Turning to the submissions relating to the final straw, the Respondent sets out the proposition that this must be capable of contributing to the breach of contract which is a correct statement of the law although it is at odds with the earlier submission that the allegations must be demonstrable allegations of breach of contract.

151. The submissions then make the bald assertion that the matter relied on as the final straw cannot contribute to the fundamental breach of contract. The Tribunal does not consider that it can be said that the matter relied upon (that is, in light of the amendment, the manner in which the Claimant's request for a pay rise was refused) is inherently incapable of contributing to a repudiatory breach of contract. The significance of this will entirely depend on the findings of fact made after hearing evidence about how the Claimant's manager dealt with this request. On the basis of the information before the Tribunal, it cannot conclude that the Claimant has little reasonable prospect of making out this aspect of her case.

152. In these circumstances, the Tribunal is not persuaded that any allegation or argument advanced by the Claimant has little reasonable prospects of success and so the Respondent's application for a deposit order is refused.

Employment Judge: Peter O'Donnell
Date of Judgment: 18 June 2021
Entered in register: 22 June 2021
and copied to parties