EMPLOYMENT TRIBUNAL S (SCOTLAND)

Case No:4107534/2019

Preliminary Hearing Heard by Cloud Video Platform (CVP) on 20 October 2021

Employment Judge L Wiseman

Mrs N Barnett	**Claimant** **Represented by:** **Ms S Shiels** **Solicitor**
Windmills Lanarkshire Ltd	**Respondent** **Represented by:** **Mr D Hay** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided:

(i) to allow the application to amend the claim to the extent of allowing the allegation that "the manager told other members of staff of the termination and freely discussed it" to be relabelled as a complaint of pregnancy discrimination (section 18 Equality Act); harassment (section 26 Equality Act) and direct discrimination (section 13 Equality Act);

(ii) to refuse the application to join the manager as a second respondent to these proceedings and

(iii) to postpone a decision in the application for Rule 50 Orders until further information has been provided.

REASONS

1. This hearing was a preliminary hearing to determine the claimant's application (i) to amend the claim; (ii) to add a second respondent and (iii) for a Restricted Reporting Order and/or Anonymity Order.

2. I heard submissions from the representatives regarding each of the above matters.

Background

3. The claimant presented a claim to the Employment Tribunal on the 28 June 2019. The claimant indicated in box 8.1 of the claim form that her claim concerned discrimination because of disability. The claimant also indicated she was making another type of claim which the Employment Tribunal can deal with. The claimant made reference in the details of the claim to "claiming Disability Discrimination and Victimisation".

4. The claimant, in the claim form, made reference to a lack of risk assessments to assess her capabilities and determine reasonable adjustments and it being unfair to lose hours because she could not work in the kitchen area because of her multiple sclerosis (MS).

5. The claimant, at box 9.2 of the claim form, which asks "what compensation or remedy are you seeking", stated she would be seeking compensation to reimburse future employment earnings. She went on to say "*I will further be claiming compensation for victimisation*". She listed various matters which included "*Manager told staff I had a terminated pregnancy as I had no morals. The termination has a truth element but on medical grounds as I was diagnosed with MS during a pregnancy 11 months before and I had a young baby to care for. I had fallen pregnant again and my body could not sustain to carry the baby so I had a termination. The Manager discussed this freely with staff."*

6. The claimant, in the claim form, made reference to the grievance she had lodged and which she included with her claim form. The grievance repeated much of the factual detail in the claim form and focussed on complaints of discrimination arising from disability and reasonable adjustments.

7. A case management preliminary hearing took place on the 15 July 2020. (There was some delay in arranging the preliminary hearing because the ET3 response was late.) The claimant was represented at that hearing by Mr Watt, Solicitor (who had been named by the claimant on the claim form). The Note issued following the preliminary hearing described the claim as one of disability discrimination, but noted the basis of the claim was not clear from the information provided on the claim form although there had been reference to victimisation, reasonable adjustments and discrimination arising from disability. The claimant's representative was ordered to provide specification and further particulars of the claim.

8. The claimant's new representative (Ms Cunningham) confirmed in an email to the Tribunal dated 19 August 2020 that an application to amend the claim was being made. The representative described the amendment as seeking to expand and particularise the claim as currently pled, and maintained the fact of the claimant's pregnancy and termination noted in box 9.2 of the claim form had made clear the claimant wished to be compensated for the way in which she was treated during her pregnancy and termination.

9. The amendment application also sought to introduce post employment victimisation in respect of new matters which had arisen since the original claim was lodged.

10. The email of the 19 August also made an application for a restricted reporting order and an anonymity order; the addition of a second respondent (being the Manager referred to in the claim form) and to remove evidence relevant to the criminal matters from the Tribunal .

11. There was, attached to the email of the 19 August, an amended claim form which ran to 8 pages and 52 paragraphs. There was, in the amended claim, reference to a claim of pregnancy discrimination in terms of section 18 of the Equality Act; harassment in terms of section 26 of the Equality Act and direct discrimination in terms of section 13 Equality Act. There was also reference to a complaint of disability discrimination and constructive dismissal. (The complaint of constructive dismissal was subsequently withdrawn in an email from the claimant's representative dated 22 February 2020 at 16.01).

12. The respondent's representative objected to the applications made by the claimant.

13. A case management preliminary hearing took place on the 7 September 2020 at which the claimant was represented by Ms Cunningham, and the respondent by Mr Kane. The Employment Judge decided it would be appropriate for a one day preliminary hearing to be arranged to determine the applications.

14. The claimant presented a second claim to the Employment Tribunal on the 23 September 2020 in which she complained of post-employment victimisation in terms of section 108(2)(a) of the Equality Act.

15. There has been delay in progressing this case because proceedings have been sisted pending the conclusion of criminal proceedings involving both the claimant and the respondent's manager, Ms Marcella. The claimant has also instructed a new representative.

16. A case management hearing took place on the 12 August 2021 and Ms Shiels, the claimant's new representative, was given a period of 5 weeks to review the claim and the applications made by the previous representative, and to confirm whether all of the applications were insisted upon. Ms Shiels was further directed to clarify the statutory basis of the claims made by the claimant.

17. Ms Shiels provided a response by email of the 17 September. Ms Shiels referred to the email of the 19 August (from the previous representative) as having been further particulars of the claim, together with a new claim of post-employment discrimination. A claim of pregnancy discrimination was also

included but Ms Shiels did not consider this to be a new claim because it had been foreshadowed in the claim form at box 9.2.

Claimant's submission – application to amend

18. Ms Shiels noted that on the 19 August the claimant's then representative had made an application to amend the claim form to include complaints of discrimination because of pregnancy and post-employment victimisation. The second claim had then been presented regarding the post-employment victimisation complaints. This claim had been presented in time and the respondent had lodged a response. Ms Shiels proposed that if the application to amend the claim was allowed, the second claim could be withdrawn.

19. The claim form had been prepared by the claimant. Ms Shiels accepted the claimant had not, in box 8.1, ticked to indicate the claim concerned pregnancy/maternity, but she had indicated she was bringing another type of claim. Also, in box 9.2, under the heading "Victimisation" there was reference to pregnancy and, it was submitted, there was sufficient here to foreshadow the claim and the application to amend only sought to relabel this claim. The claims of victimisation and harassment because of pregnancy were not new claims and the respondent had had notice of them.

20. Ms Shiels referred to the cases of ***Selkent Bus Company Ltd v Moore 1996 ICR 836*** and ***Cocking v Sandhurst Stationers Ltd 1974 ICR 650***.

21. Ms Shiels noted the case had been sisted for some time and that no dates had yet been set for the hearing. This was, therefore, a good time to get the pleadings formalised. Ms Shiels suggested the respondent was well aware of all the issues being complained of. The Employment Judge had, at the first preliminary hearing, ordered further and better particulars of the claim to be provided, and this had been done.

22. The prejudice to the claimant of refusing the application was considerable. The respondent's attitude had changed considerably when the claimant disclosed her pregnancy and termination. The legal provisions regarding pregnancy

discrimination were complex and it was difficult for an unrepresented party to work their way through it.

23. Ms Shiels, in summary, invited the Tribunal to allow the application to amend because it was a relabelling of facts already pled; the second claim had been presented in time, and the further particulars had been provided int time. The pregnancy was closely related with the disability.

24. Ms Shiels responded to the respondent's submission by noting the cases referred to were not relevant. Ms Shiels noted that part of the delay in this case had been caused by the respondent entering a late response. Further, she would object to the application to include harassment being refused, because it had already been pled in the ET1.

Respondent's submission – application to amend

25. Mr Hay accepted the second claim had been presented in time and a response had been entered. He suggested it was a case management issue how best to deal with this claim in terms of combining the claims or having the second claim withdrawn if the application to amend is allowed. Mr Hay confirmed the application to amend in respect of the other matters was opposed for three reasons: (i) the nature of the amendment was more than a relabelling: it sought to introduce new claims albeit based on the factual matrix of the disability discrimination claim; (ii) timing and manner and (iii) prejudice.

26. Mr Hay could not dispute who completed the claim form, but he invited the Tribunal to note that at section 11 of the form, Mr Alan Watt, Solicitor, was noted as the representative. Further, at section 9.2 of the claim form, the last paragraph referred to "my solicitor". We did not know whether Mr Watt had input to the claim form, but it was clear the claimant had consulted with him and had had the benefit of legal advice even if he had not completed the claim form. Mr Hay accepted the law around pregnancy and maternity was complex, but the claimant had had the benefit of legal advice. Also, the claims were such that they were not difficult to understand and complain about.

27. The claim form at box 9.2 deals with remedy and, Mr Hay submitted, it looked – from the details provided – like the claimant had understood this because she set out what she wished to receive if successful with her claim. The claimant had, in box 9.2 made a reference to the termination of her pregnancy and to the fact of her pregnancy being disclosed to others.

28. The claim form at box 8.2 asks for details of the claim. The claimant ticked disability discrimination in box 8.1, but not pregnancy/maternity. The details provided by the claimant made no reference to pregnancy: the focus was on disability. This was the basis of the claim the respondent had to meet. The respondent, in the ET3, focussed on the factual assertions. There was no focus on pregnancy.

29. Mr Hay submitted the claim form was important. He referred to the ***Chandhok* v Tirkey UKEAT/0190/14** case, and in particular to paragraphs 16 – 18 where it was said the purpose of the ET1 is not just to get the ball rolling. The claim form sets out the essential case to which the respondent must respond.

30. The jurisdiction of the Tribunal is to deal with the claims before it: ***Chapman v Simon 1994 IRLR 124.***

31. Mr Hay submitted the application to amend was not just in respect of the new claim: there were a number of claims, for example, direct discrimination and harassment had not been in the original claim form. These claims may be based on the same factual window but this was not a relabelling exercise: different claims were being alleged.

32. Mr Hay noted the claim form had been presented on the 28 June 2019. The application to amend had been made on the 19 August 2020. If the application to amend was allowed, the new claims would be deemed to have been presented at the date the application is allowed (***Gallilee v Police of the Metropolis UKEAT/0207/16).***

33. Mr Hay noted Tribunals have a broad discretion in respect of timebar in discrimination cases. In ***Abertawe Bro Morgannwg University Health Board v Ferguson EAT 0044/13*** (paragraphs 18 – 20) it was said the length of and reasons for the delay is an important factor. Mr Hay asked what was the reason for the delay in this case. The application to amend had been made on the 19 August 2020. Why was the application not dealt with before the claimant agreed to the sist of proceedings. Mr Hay asked whether it was just and equitable to extend time for a substantially late claim. This was particularly so when seeking to introduce a second respondent.

34. Mr Hay submitted the balance of prejudice impacted more on the respondent if the amendment was allowed. The amendment sought to introduce new claims which were substantially out of time. There was no explanation for the delay. The respondent would incur more time and expense if the amendment was allowed because the ET3 would need to be substantially reframed and there was a risk the claim would be stale.

35. Mr Hay invited the Tribunal to refuse the application to amend; if not, then consideration could be given to allowing part of the amendment, or refusing the harassment claims or ordering the claimant to pay costs to the respondent to reflect the extra cost incurred in responding to the amendment.

Claimant's submission – adding a second respondent

36. Ms Shiels invited the Tribunal to add Ms Marscella as a second respondent (in both claims) because the two post-employment incidents involved her. It was not yet clear whether the respondent would accept liability for her conduct.

Respondent's submission – adding a second respondent

37. Mr Hay relied on his above submissions regarding prejudice. He noted the new claim had been presented on the 23 September 2020. He considered the timing of the application to amend was a relevant factor to consider because it goes to prejudice. This was not a case where new evidence had come to light. There had been a breakdown in the relationship and the decision not to include the

second respondent in the claim form at the time it was presented was significant.

Claimant's submission – application for a Rule 50 and anonymity order

38. Ms Shiels invited the Tribunal to grant the application because of the nature of the claimant's disability and the sensitivity regarding the termination of the pregnancy. The fact there had been criminal proceedings in open court regarding the claimant and the manager Ms Marscella, did not mean there was a bar to privacy for this hearing.

39. Ms Shiels submitted a anonymity order should be put in place in respect of the judgment and a restricted reporting order should be put in place regarding the claimant's name because the claimant's Article 8 rights would be prejudiced. The respondent has a view of the termination of the pregnancy and there was a real risk that this could be promulgated in a way prejudicial to the claimant.

Respondent's submission – application for a Rule 50 and anonymity order

40. Mr Hay submitted the issue for the respondent was whether there was sufficient, when balancing the Article 6 and Article 8 rights, to grant the order. Mr Hay referred to the case of ***Rodin v BBC*** and the judgment of Simler J.

41. Mr Hay acknowledged there were clearly sensitive aspects in terms of the claimant's disability, but he questioned whether they required anonymity, or whether they could be dealt with through a sensitive handling of the narrative. For example, did the Tribunal need to make findings of fact regarding these matters. Open justice is the default and primary consideration and there require to be weighty factors to move away from it. The parties are expected to put up with some degree of embarrassment.

42. Mr Hay noted anonymity would not simply be for the claimant: all parties would require to be anonymised.

43. Mr Hay invited the Tribunal to question whether the Orders were necessary and whether any issues could be addressed and overcome by sensitive judgment writing.

Discussion and Decision

The application to amend the claim

44. I firstly had regard to the claim form presented by the claimant. I noted the claimant had provided details of a legal representative, Mr Watt, and she stated she had been encouraged by her solicitor to send the claim form to the Tribunal. There was no clarity regarding who had completed the claim form but it did appear clear that the claimant had had access to legal advice and also the benefit of some legal advice prior to completion of the claim form.

45. I have noted above (Background) that the claim form indicated the claimant was making a complaint of disability discrimination and victimisation, although the basis of those claims was not clear from the information provided. I considered it instructive to note that at the first preliminary hearing the understanding of both representatives (and the basis upon which the response had been entered) was that this was a claim about disability discrimination. The understanding of the representatives was unsurprising in circumstances where the details of the claim referred to alleged discrimination arising from disability and a failure to make reasonable adjustments. There was no mention, in the details of the claim provided, of pregnancy or termination of pregnancy.

46. The one reference to pregnancy was made in the section of the claim form dealing with remedy, and was made in connection with a complaint of victimisation where the claimant alleged her Manager had freely discussed with staff the fact of her pregnancy and termination.

47. I next had regard to the application to amend the claim made by email of the 19 August 2020. The email described the nature of the amendment as being "*such that it only seeks to expand and particularise the claim as it is currently pled. The amendment includes the original matters that were pled in the claim form…….. The amendment does not seek to introduce new claims that the respondent has not had fair notice of."*

48. There was, attached to the email, an amended claim form which ran to 8 pages. The claim form included a section entitled "Background" consisting of 16 paragraphs, which made reference to the claimant having been diagnosed with Multiple Sclerosis while pregnant in April 2018, and the remaining paragraphs focussed on the claimant's pregnancy and termination.

49. The claim form went on to particularise the following claims:

(i) Pregnancy discrimination in terms of section 18 Equality Act, where it was asserted:-

- the Manager's attitude changed towards the claimant immediately after she disclosed her pregnancy;
- the Manager disclosed the claimant's pregnancy and her intention to have a termination to other members of staff;
- the Manager's attitude and comments regarding the termination were upsetting;
- there was a failure to carry out a risk assessment or have any consideration towards the sickness the claimant was suffering from as a result of her pregnancy
- there was a failure to carry out a risk assessment following the claimant's termination;
- the Manager failed to enquire whether the claimant required medical assistance after the claimant passed the product of her pregnancy;
- the manager sent a text saying "*because she has diagnosis they would believe relapses are possible!"* and
- the manager sent a text saying "*she is conning Christopher and your mum about this too saying illness is so bad"*

(ii) Harassment in terms of section 26 Equality Act where it was asserted the following actions amounted to unwanted conduct which had the effect of violating the claimant's dignity and creating a hostile environment:-

- the manager had disclosed the claimant's pregnancy and her intention to have a termination to other members of staff;
- the manager encouraged the claimant's sister-in-law to inform the claimant's husband of the termination before the claimant had had an opportunity to inform him;
- the manager sent the claimant's sister-in-law a text message saying she felt sick about the termination and the claimant's selfish attitude towards it;
- the manager, in response to the claimant disclosing her intention to have a termination, stated "there are worse things in life than a baby";
- the manager disregarded the medical basis for the claimant's decision to terminate her pregnancy;
- the manager failed to carry out a risk assessment or have any consideration towards the sickness the claimant was suffering from as a result of her pregnancy;
- two weeks prior to the termination, the claimant asked the manager about wages that had not been paid, and the manager responded that she "*had to pay her fucking bank charges*";
- the manager told staff she doubted the claimant had been to hospitality college and said she was "*an idiot*";
- the manager did not carry out a risk assessment following the claimant's termination;

- the manager failed to make enquiries of the claimant as to whether she required medical assistance after she passed the product of her pregnancy;

- the manager, when informed by the claimant that she had passed the product of the pregnancy, responded "*no problem*";

- the manager (with regard to the claimant's MS) made clear to staff she did not believe the claimant was ill and was exaggerating her symptoms;

- the manager sent a text message to the claimant's sister-in-law saying "*it all suits her narrative/lie. I didn't support her at work now she will get sick pay instead of nothing. It is her soul that is sick";*

- the manager sent a text saying "*because she has diagnosis they would believe her relapses are possible!";*

- the manager sent a text saying "*she is conning Christopher and your mum about this too saying illness is so bad";*

- the manager told the claimant that if she did not work in the kitchen the Board would have to reduce her days and that she "*did not give a shit about her losing hours"* and

- the manager read out the claimant's grievance to members of staff, marked it in red pen and commented on the grammar.

(iii) Direct discrimination in terms of section 13 Equality Act, where it was asserted the claimant had been treated less favourably when:-

- the manager disclosed the claimant's pregnancy and her intention to have a termination to other members of staff;

- the manager commented there were worse things in life than a baby;
- the manager failed to carry out a risk assessment or have any consideration towards the sickness the claimant was suffering from as a result of her pregnancy;
- the manager failed to carry out a risk assessment after the termination;
- the manager failed to make enquiries as to whether the claimant needed medical assistance after she passed the product of the pregnancy and
- the manager, when informed by the claimant that she had passed the product of her pregnancy, responded "no problem".

(iv) Direct disability discrimination in terms of section 13 Equality Act, where it was asserted the claimant had been treated less favourably when:-

- the manager disregarded the medical basis for the claimant's decision to terminate her pregnancy;
- failed to carry out risk assessments;
- the manager (in relation to the claimant's multiple sclerosis – MS) made it clear to staff she did not believe the claimant was ill and was exaggerating her symptoms;
- the manager sent a text message to the claimant's sister-in-law saying "*it all suits her narrative/lie. I didn't support her at work now she will get sick pay instead of nothing. It is her soul that is sick";*

- *the manager sent a text message saying "because she has diagnosis they would believe her relapses are possible!";*
- the manager sent a text saying "*she is conning Christopher and your mum about this too saying illness is so bad";*
- the manager proposed the claimant would have to work in the kitchen or have her hours cut;
- the manager told the claimant that if she did not work in the kitchen the Board would have to cut her days and that she "*did not give a shit about her losing hours";*
- the claimant raised a grievance on the 3 April but received no response or outcome;
- the manager read out the grievance to members of staff, marked it with a red pen and commented on the grammar;

(v) Discrimination arising from disability in terms of section 15 Equality Act, where it was asserted the claimant had been treated unfavourably when:-

- the manager disregarded the medical basis for the claimant's decision to terminate her pregnancy and
- the manager told the claimant that if she did not work in the kitchen the Board would have to reduce her days and that she *"did not give a shit about her losing hours".*

(vi) Failure to make reasonable adjustments in terms of Section 20 Equality Act, where it was stated there had been a failure to make reasonable adjustments when:

- the manager told the claimant that if she did not work in the kitchen the Board would have to reduce her days and that she *"did not give a shit about her losing hours".*

50. The amended claim form also included a claim of constructive dismissal (which was subsequently withdrawn) and a claim of post-employment victimisation (which was the subject of the second claim presented by the claimant).

51. I next had regard to the case law to which I was referred. The importance of setting out the claim in the ET1 was stressed in the ***Chandhok*** case (above) where it was said "*the claim, as set out in the ET1, is not something just 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 on their say so… the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it.*

52. There is no doubt a claim (or response) may, with the Tribunal 's leave, be amended. A Tribunal has a broad discretion to allow amendments at any stage of the proceedings. In the case of ***Cocking v Sandhurst*** (above) it was said that the key principle for Tribunals to follow was that in exercising their discretion, Tribunals must have regard to all of 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 the ***Selkent*** (above) case where it was said that in determining whether to grant an application to amend, an 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. The then President of the EAT explained that relevant factors to consider would include:

- the nature of the amendment and whether it involved a minor matter, for example the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded; or a substantial alteration pleading a new cause of action, for example, the making of entirely new factual allegations which change the basis of the existing claim;

- 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/cause of action is out of time and, if so, whether the time limit should be extended;

- 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.

53. I also had regard to the case of ***Abercrombie v Aga Rangemaster Ltd 2013 IRLR 953*** where the Court of Appeal cautioned against adopting too formalistic approach to the question of whether a new cause of action was being proposed in an amendment. It was said that Tribunals 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".*

54. I next turned to consider the submissions made by the representatives. Ms Shiels, in her submission, suggested the nature of the amendment was a relabelling exercise in circumstances where there had been sufficient reference to pregnancy in the ET1 claim form to foreshadow the claim, and that victimisation and harassment because of pregnancy were not new claims. I, in considering that submission, noted the details of claim in the claim form focussed on two points: firstly, there was a complaint that no risk assessment

had been done to consider any needs arising or any reasonable adjustments required and secondly, there was a complaint regarding a reduction of hours and a proposal to work in the kitchen. The claimant went on to say, at section 9.2 of the claim form, that she would be seeking compensation for victimisation because the manager told staff she had terminated a pregnancy and freely discussed this.

55. I have set out details (above) regarding the alleged acts relied upon in the complaint of pregnancy discrimination. Those acts included an allegation that the manager's attitude changed after she was informed of the claimant's pregnancy; there being no risk assessment or consideration of the sickness the claimant suffered due to her pregnancy; there being no risk assessment after the termination; the manager's attitude to the termination; there was no enquiry made by the manager whether the claimant required medical assistance after passing the product of the pregnancy and comments made by the manager.

56. These were all new factual assertions not referred to, or foreshadowed, in the claim form. I considered that, put simply, the claim form told of difficulties which the claimant encountered because of her disability: the application to amend introduced completely different matters which would involve different areas of enquiry.

57. Ms Shiels submitted the application to amend was a relabelling exercise. I accepted there was an argument for relabelling the allegation that the manager had told staff of the termination and discussed it freely. I could not however accept that then opened the door to an amendment which sought to introduce a whole range of completely new matters (both factual and legal) which had not been foreshadowed in the claim form.

58. I concluded the application to amend sought to introduce a new cause of action (pregnancy discrimination in terms of section 18(2) Equality Act): it made entirely new factual allegations which changed the basis of the claim.

59. I next considered Ms Shiels' argument that victimisation and harassment because of pregnancy were not new claims. I acknowledged the fact the claimant had made reference in the claim form to making a complaint of victimisation. There was, however, no suggestion of a complaint of harassment being made. I therefore concluded the application to amend sought to introduce a new cause of action (harassment) and that it made entirely new factual allegations which changed the basis of the claim.

60. The issue of time limits requires to be considered. The question of whether a new cause of action contained in an application to amend would, if it were an independent claim, be time barred, falls to be determined by reference to the date when the application to amend is made. So, would a complaint of pregnancy discrimination made on the 19 August 2020 be in time, and if not, would it be just and equitable to extend time.

61. The claim form was presented to the Tribunal on the 28 June 2019. The application to amend the claim was made on the 19 August 2020. A claim concerning pregnancy discrimination must be presented to the employment tribunal within a period of three months starting with the date of the act complained of.

62. The claimant worked for a period of three months from 7 January to 5 April 2019 and the matters about which she complained occurred in that period. A claim about those matters would have to have been presented by July 2019. I considered that even allowing for the early conciliation process, a new cause of action made on the 19 August 2020 was almost a year late.

63. A claim which is made out of time may, if it is just and equitable, be permitted to proceed. Tribunals have a wide discretion to allow an extension of time under the "just and equitable" test and may find it helpful to have regard to the length of and reasons for the delay; the extent to which the party sued has co-operated with any requests for information; the promptness with which the

party acted once she knew of the facts giving rise to the cause of action; the steps taken by the claimant to obtain appropriate advice once she knew of the possibility of taking action and, most importantly, the prejudice which each party would suffer as a result of the decision to allow, or not, the amendment (***British Coal Corporation v Keeble 1997 IRLR 336***).

64. There was a period of 14 months between the claim being presented and the application to amend being made. There was no explanation for the length of this period of time. The claimant has been legally represented throughout, albeit by different representatives. I have noted (above) that Mr Watt was noted as being the claimant's representative on the claim form and although Ms Shiels maintained the claimant had completed the claim form herself, there was reference in the claim form to having consulted her representative prior to presenting the claim form. I considered it reasonable to infer from this that the claimant had received some legal advice prior to completing the claim form. The claimant certainly had access to legal advice.

65. I had regard to the fact all of the allegations set out in the amended claim form were all matters of which the claimant was aware at the time of completing the claim form. Ms Shiels submitted the law regarding pregnancy discrimination was complex and it would have been difficult for the claimant to work her way through this. I take no issue with the fact the law is complicated, however the claimant had access to legal advice when she completed the form and could have included not only reference to her pregnancy and termination but also details of what she wished to complain about. An unrepresented claimant may not be expected to identify the statutory basis of their claim, but they are expected to be able to narrate a factual narrative of what happened and what they are complaining about.

66. I next had regard to the balance of prejudice if the application to amend is granted or refused. I accepted that if the application to amend is refused the claimant will not be able to pursue the new claims. Ms Shiels submitted the pregnancy and termination were inextricably linked to the claimant's disability.

I acknowledged this submission, but considered that it made it even more surprising why it had not been included in the claim form.

67. The prejudice to the respondent if the application to amend is allowed is considerable. There has een significant delay in having the application to amend determined. This has been caused by the fact the claim has been sisted to allow for the conclusion of criminal proceedings involving both the claimant and the manager of the respondent. The effect of this is that the application to amend was made 14 months after the claim form was presented, and the determination of the application to amend was 14 months later in October 2021. A period, therefore, of almost 2.5 years has passed since the claim was presented. This is a considerably lengthy period of time for witnesses' memories.

68. The respondent would require to amend it's response and seek further particulars from the manager and other witnesses.

69. I also had regard to the fact the criminal investigations/proceedings which have taken place involved the claimant and the manager. There would appear to have been a complete breakdown of the relationship between them and this raised a concern that not only would the evidence be stale, but also positions would be entrenched.

70. I concluded, having had regard to all of the above points, that the new claims have been presented out of time, and that it would not be just and equitable to extend time. I acknowledged this is not fatal to the application to amend, but it is a factor to consider.

71. I have decided the complaints of pregnancy discrimination and harassment are new claims which have been presented out of time, and that it would not be just and equitable to extend time. I have further decided the balance of prejudice, in allowing the application to amend, lies with the respondent. Mr

Hay invited me to refuse the application to amend, but if I did not do that, then to consider granting it in part. I next considered this issue.

72. I have acknowledged (above) the fact the claimant included in the claim form (at box 9.2) an allegation that the manager told staff she had had a termination and had freely discussed it. This was said to be a complaint of victimisation. I have also acknowledged (above) that there is an argument this allegation should be relabelled.

73. I decided the application to amend should be granted in a limited respect to allow for the allegation that the manager told staff the claimant had (or intended to have) a termination and discussed it freely with staff, to be relabelled as a complaint of pregnancy discrimination in terms of section 18(2) Equality Act, and as a complaint of harassment in terms of section 26 Equality Act and as a complaint of direct discrimination in terms of section 13 Equality Act.

74. The application to amend to introduce a (wider) complaint of pregnancy discrimination, harassment and direct (sex) discrimination as detailed in the proposed claim form is refused.

75. I have not dealt with the application to amend to introduce post-employment victimisation, because the claimant presented a new claim regarding these matters. The claim was accepted and a response has been entered. I considered the second claim should now be combined with the first claim.

The application to join a second respondent to the proceedings

78. Ms Shiels invited the Tribunal to join the manager as a second respondent to the proceedings (both claims) because of the two post-employment incidents which involved her.

79. I had regard to rule 34 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which gives tribunals a wide discretion to add, substitute and/or remove parties to proceedings.

80. I also had regard to the terms of section 109 of the Equality Act which provide that an employer is liable for acts of discrimination, harassment and victimisation carried out by its employees in the course of employment unless the employer can prove that it took all reasonably practicable steps to prevent the employee from doing the act in question. I noted the respondent in this case did not seek to rely on a section 109 defence. Accordingly, if the manager carried out the discriminatory acts alleged by the claimant, the respondent will be liable.

81. I, in considering the application made by the claimant, had regard to the fact the second claim was presented on the 23 September 2020. This was a month after the application to amend the claim had been made, which included an application to join the manager as a second respondent to the proceedings. The claimant and her (then) legal representative had an opportunity to bring the claim involving post-employment victimisation against both the respondent and the manager. They, notwithstanding the application which had been made a month prior to presenting the claim, did not do so and no explanation was given for why they did not do so.

82. I concluded that in circumstances where the respondent is not relying on a section 109 Equality Act defence, and where the opportunity to bring the second claim against the employer and the manager was not taken, there was no good reason at this stage to join the manager as a second respondent to the claims, which are correctly brought against the claimant's employer. I decided to refuse this application.

Application for a Rule 50 and anonymity order

83. Ms Shiels invited the Tribunal to make an order for anonymity and restricted reporting because of the nature of the claimant's disability and the sensitivity of the termination. Ms Shiels told the Tribunal that "*the respondent has a view*

regarding termination and there is a real risk this would be promulgated in a way adverse to the claimant. There would be a real impact on the claimant if this was publicised and there was a reputational risk for the whole family."

84. A Tribunal has power under the terms of rule 50 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 to make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person .. Rule 50 goes on to say that in considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

85. I had regard to the case of ***A v Burke and Hare EATS/0020/20*** where it was said that the principle of open justice assumes that all the details of a case should be made public unless there is some identifiable injury to the claimant's ECHR rights, notably article 8, right to privacy. The EAT upheld the Tribunal decision to refuse to grant an anonymity order on the basis the claimant had failed to provide a sufficiently strong reason to override the principle of open justice. It was clear from the case law that stigmatisation as a form of reputational damage was insufficient to outweigh the principle of open justice and that social opprobrium would not justify an anonymity order. Different considerations would arise if there was a material risk that stigmatisation would lead to verbal abuse ….

86. I had regard to the fact the starting point, when considering the claimant's application, is that the principle of open justice assumes all details of a case should be made public. There must be weighty considerations to move away from that position. Ms Shiels referred to the nature of the claimant's disability (multiple sclerosis) and the sensitivity of the termination. There was, however, no further information to inform the Tribunal what it was about the nature of the claimant's disability which required protection. Would the Tribunal, for example, be required to hear evidence regarding the sensitive/personal

aspects of the disability, or would this not be necessary given the complaints being pursued?

87. Ms Shiels further submitted the respondent had a view regarding termination and that there was a real risk this would be promulgated in a way adverse to the claimant. I, in considering this, did not know quite what was being alluded to.

88. I also had regard to the fact that the application to amend the claim has been restricted to relabelling the allegation that the manager told staff of the termination and freely discussed it. I was not addressed on the issue of whether having restricted the amendment in this way impacted on the application for rule 50 orders.

89. I concluded that in the absence of the information identified above, I could not give full and proper consideration to either Mr Hay's submission that this could be dealt with by sensitive judgment writing, or to the application for orders. I accordingly decided to hold over my decision regarding this application until such time as the claimant's representative confirms the following:

- will the Tribunal be required to hear evidence regarding the sensitive/personal aspects of the claimant's disability;
- what is meant by "the respondent has a view regarding termination, and there is a real risk this would be promulgated in a way adverse to the claimant" and
- what do you say in response to the proposal these matters can be dealt with by way of sensitive judgment writing rather than Orders.

Case Management

90. I decided to grant the application to amend the claim, to the extent of allowing the allegation that the manager told other members of staff about the termination and freely discussed it to be relabelled as a complaint of pregnancy discrimination (section 18(2) Equality Act); harassment (section 26 Equality Act) and direct discrimination (section 13 Equality Act).

91. I decided it would be appropriate to issue the following case management directions (which were discussed and agreed with the representatives):-

- ***the respondent will have a period of 21 days from receipt of this Judgment to amend its Response and clarify its position regarding whether the issue of the claimant being a disabled person can be conceded;***

- ***the claimant is to produce a consolidated claim to confirm the statutory basis and details of all the claims being pursued;***

- ***the representatives are to agree a List of Issues and***

- ***the representatives are, within a period of 21 days from receipt of this Judgment, to confirm to the Tribunal the names of the witnesses to be called to give evidence at a hearing, the number of days required for the final hearing and details of availability during the months of February, March and April 2022 for a final hearing.***

Employment Judge: **L Wiseman**
Date of Judgment: **9 November 2021**
Entered in register: **12 November 2021**
and copied to parties