EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Ms A Bailey		(1) Stonewall Equality Limited (2) Garden Court Chambers Limited (3) Rajiv Menon QC and Stephanie Harrison QC, sued as Representatives of all members of Garden Court Chambers (except the Claimant)

Heard at: London Central **On**: 12 October 2021

Before: Employment Judge Stout

Representations
For the Claimant: Ben Cooper QC
For Stonewall Equality Limited: Ijeoma Omambala QC
For Garden Court Chambers Limited and Garden Court Chambers: Jane Russell

WRITTEN REASONS FOR DECISION ON AMENDMENT APPLICATION

Apology

1. I apologise to the parties for the delay in providing these written reasons. Unfortunately, no doubt through my own error, the recording of my oral judgment given at the hearing did not work. These written reasons have therefore had to be reconstructed from my notes, but they reflect so far as possible (and save where indicated) the reasons I gave at the time.

Background

2. These proceedings were commenced on 9 April 2020. The Claimant applied to amend her claim by applications of 12 October 2020 and 4 February 2021, which applications I granted at an Open Preliminary Hearing on 11/12 February 2021. The Claimant was required to provide further particulars of the individuals against whom claims were made. She then provided further particulars of her claims on 25 May 2021. These further particulars are very substantial and name 23 individual barristers and employees from Garden Court. The Respondent provided a response to the Claimant's further particulars, equally substantial, on 27 July 2021. The claim was (prior to this hearing) listed for 20 days commencing on 25 April 2022. That time estimate was arrived at before it was known that the Claimant names 23 individuals. In light of the increase in the number of witnesses, the length of the hearing was extended at this hearing by 5 days to 25 days.

3. I adopt abbreviations I have used previously of "Stonewall" for the First Respondent and "Garden Court" for the other respondents, identifying individual other respondents or groups of respondents further as appropriate.

Claimant's amendment application to add a claim of discrimination because of philosophical belief

4. By letter of 30 September 2021 the Claimant sent a draft further amendment application to the Respondents indicating that she intended to apply to amend so as to add to her existing claim a claim of direct discrimination because of philosophical belief. At that point Garden Court had indicated that they intended to amend to plead a legitimate aim in relation to the existing indirect discrimination claim, but then decided not to pursue an application to amend and objected to the Claimant's application to amend, notifying the Claimant on 6 October 2021. The Claimant then applied to the Tribunal on 6 October 2021, and Garden Court responded maintaining their objection on 7 October 2021.

5. All parties prepared detailed written submissions for this hearing, which I read. Although there were a number of other matters of case management to deal with at this hearing, it was apparent to me that the decision whether or not to grant the amendment was one that was of great significance to all parties, and for that reason I permitted all three advocates ample time to develop orally their written submissions, so that the amendment application took up the best part of the day's hearing. I granted the application for reasons given orally at the hearing and the written Order was sent to the parties shortly after. I said at the time, and repeat now, that I intend no disservice to the advocates' excellent submissions by not setting those out in my reasons.

The law

6. There was no dispute as to the legal principles I was required to apply. The Tribunal has a discretion under Rule 29 to permit amendments to a party's statement of case. In accordance with the principles in *Selkent* [1996] ICR 836, it is a discretion to be exercised in accordance with the over-riding objective and taking into account all the circumstances, including:
    a. the nature and extent of the amendment,
    b. its timing (including any applicable time limits and the implications of the amendment in terms of impact on the trial timetable or costs),
    c. its merits (where those are obvious, there being no point in adding an amendment to bring a hopeless claim), and
    d. the relative prejudice/hardship to the parties of either granting or refusing it.

7. Unusually for an amendment application, I was referred to a substantial bundle of authorities, including *Cocking v Sandhurst (Stationers)* Ltd [1974] ICR 650, *Brown and ors v Innovatorone Plc* [2011] EWHC 3221 (Comm), *Abercrombie and ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148, *Chandok v Tirkey* (UKEAT/0190/14/KN), *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345, *Reuters Limited v Cole* (UKEAT/0258/17/BA), *Rose and Ors v Creativity etc Limited* [2019] EWHC 1043 (and *Quah Su Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) and *Nesbit Law Group LLP v Acasta European Insurance Co Ltd* [2018] EWCA Civ 268 cited therein), *Vaughan v Modality Partnership* [2021] ICR 535 and *Mist v Derby Community Health Services NHS Trust* [2016] ICR 543. These were for the most part familiar to me, but it was nonetheless helpful to be referred to them in the context of this application and I take from them the following guidance by way of supplement to the *Selkent* principles:

    (1) In deciding whether or not to permit an amendment, the Tribunal must first consider the nature of the amendment, in particular, whether it is the addition of factual details to existing legal claims or addition or substitution of other legal labels for facts already pleaded to or whether it amounts to making an entirely new claim (*Selkent*).
    (2) If a new claim is to be added by way of amendment, then the parties accepted for the purpose of this hearing that the Tribunal must consider whether the complaint is out of time or, at least, whether there is an arguable case that it is in time (although Mr Cooper QC expressly reserved his right to argue otherwise on appeal should the matter proceed further). For this purpose, the new claim is deemed received at the time at which permission is given to amend (*Reuters* at [31], following *Galilee v Comr of Police of the Metropolis* [2018] ICR 634 at [109(a)]) (or possibly the date on which the application to amend is made, but not earlier). If it is out of time, or not reasonably arguably in time, permission should be refused.
    (3) If the proposed amendment is simply relabelling of existing pleaded facts with new legal labels, there is no need to consider the question of time limits (*Reuters*, [15] and [27]), although timing generally will still be a

consideration, along with all the other factors. The later in proceedings the amendment, the less likely it will be allowed.

(4) Consideration needs to be given to the extent to which the amendment will involve substantially different areas of enquiry to the old (*Abercrombie*).

(5) While it is in general desirable to permit amendments where that will enable the Tribunal to adjudicate on the 'real dispute' between the parties, the pleadings are important (*Chandok*, [16]) and prejudice may be caused by late amendments not only in terms of the impact on the final hearing, but also as a result of what steps a party might have taken had the case been pleaded properly from the outset.

(6) It may be relevant to consider whether the prejudice from granting an amendment can be compensated for in costs, if the party seeking the amendment is likely to be able to meet them, but that is not the only consideration, and not all prejudice will be compensable by costs (*Rose,* [37]).

(7) The balance of prejudice is of over-riding importance, which requires a focus on reality, not supposition, and may not be a risk-free exercise for the party applying if the amendment is needed because of a potential weakness in the case which may be exploited if the application is refused (*Vaughan*, [21]-[22]).

8. To that list I add an authority that was referred to at the last Open Preliminary Hearing: where the need for an amendment arises because of the 'fault' of the party or a legal adviser, that is not necessarily a reason for the amendment to be refused (cf *Evershed v New Star Asset Management* UKEAT/0249/09 at [33] per Underhill P).

My decision

9. I consider first the nature and extent of the amendment as regards the Garden Court respondents. The current claims against them are: (i) victimisation by subjection to detriments as pleaded at paragraph 24(b) of the Details of Claim because the Claimant made alleged protected disclosures as pleaded at paragraph 24(a); and (ii) indirect sex and sexual orientation discrimination on the basis that the Garden Court respondents (or some of them) had a provision, criterion or practice (PCP) of treating gender critical beliefs (such as those held by the Claimant and pleaded at paragraph 8) as being bigoted or otherwise unworthy of respect.

10. On the face of the pleading, the amendment is minor: the Claimant relies on the already-pleaded beliefs as constituting a philosophical belief for the purposes of s 10 of the EA 2010. She contends that each of the detriments relied on for the purposes of the victimisation claim is in the alternative a detriment to which she was subject because of her belief. The facts she relies on in support of the inference that her belief was the reason for the treatment are the same as the facts that she has already particularised at paragraphs 54-70 of her Further Particulars as matters relied on as

evidencing that the PCP exists for the purposes of the indirect discrimination claim.

11. The overall effect of the proposed amendment therefore is to combine under one straightforward legal heading claims and issues that in the current pleading sit somewhat awkwardly under two separate heads of indirect discrimination and victimisation. Under the existing indirect discrimination claim, the issues include whether the respondents applied a PCP of treating gender critical beliefs as being bigoted or otherwise unworthy of respect, whether that puts women or lesbians at a disadvantage generally and whether it put the Claimant at a disadvantage in certain respects. Under the amended claim the question is more straightforward: was the Claimant treated less favourably because of her gender critical beliefs? That question is to be answered by examining the mental processes of the individuals who are already accused of victimising her for doing protected acts. In relation to each alleged detriment, the Tribunal will already be considering the reason for the treatment complained of, but under the amended claim it will need to consider not only whether it was because of the protected act(s) but also whether it was because of the Claimant's belief.

12. We further established in the course of the hearing that for 14 of the alleged victimisers (but not for five staff members and one barrister member, Ms Davies QC) the question of whether they have a general practice of treating the Claimant's beliefs as bigoted or not worthy of respect will already be considered by the Tribunal at the hearing as all individual barrister members bar Ms Davies QC are identified by the Claimant in her Further Particulars as being, individually as well as collectively, operators of the alleged PCP. (I pause to note that this point, i.e. that the Claimant's indirect discrimination claim is put on the basis that individuals operated the PCP, for whose actions Chambers/the corporate respondent are liable, had not apparently been appreciated by Ms Russell prior to this hearing, but there is no doubt that that has been the pleaded case and is reflected in the pleadings as they stand and the Claimant's further particulars at paragraphs 47-53.)

13. Mr Cooper accepts, correctly in my judgment, that because the proposed amendment involves a change in the alleged reasons for the respondents' actions, it constitutes a 'new claim'. However, as I have endeavoured to explain above, it comes very close to being a 'mere' relabelling.

14. It will also not involve substantial additional areas of enquiry. No new facts are added at all. For most of the individuals, Garden Court chambers and the corporate respondent, there is no wider factual enquiry, there is simply an additional question to be asked as to the reasons for the detriments already pleaded in the victimisation claim, and for most of the alleged victimisers it is not even really an additional question because essentially the same question about treatment of the Claimant's beliefs is already being asked in the indirect discrimination claim where they are alleged to be PCP operators.

15. That is not quite the case for the individual staff members named in the victimisation claim, and Ms Davies QC. If the amendment is permitted, they will now face for the first time an allegation that they have treated the Claimant less favourably because of her gender critical beliefs. That is not an allegation previously made against them personally, so the factual enquiry is widened slightly for them since in order to answer the additional question, the Tribunal will need to consider what they knew of the Claimant's gender critical beliefs, which was previously not the case. The significance of this for the individual staff members is lessened somewhat by the fact that staff members are not named as individual respondents, they are only individuals for which the corporate Garden Court respondent may be liable.

16. I next consider the nature and extent of the amendment against Stonewall. The current claim against Stonewall is for instructing/causing/inducing a basic contravention of the EA 2010 in breach of EA 2010, s 111. The proposed amendment changes the basic contravention that Stonewall is alleged to have instructed/caused/induced. In principle, it seems to me that changing the basic contravention could involve a change to a s 111 claim. For example, a change in the underlying contravention from one incident occurring on one date to a different incident on another date *could* amount to a new claim against a s 111 respondent if it involved looking at different actions by that respondent or significantly changed the nature of the causal relationship between the alleged act and the basic contravention as might be the case if the basic contravention changed from being, for eg, discrimination on grounds of sex into discrimination on grounds of race. However, what is proposed in this case does not do that. The acts relied on as causing/inducing/instructing by Stonewall remain the same in the proposed amended claim and the alleged motivating or causal factor remains the same, i.e. Stonewall's policy or approach to gender critical beliefs and the steps it took, or may not have taken, to persuade the Garden Court respondents to follow that policy or approach. No new facts are relied on at all and the legal claim against Stonewall remains the same. In those circumstances, I accept Mr Cooper's submission that the claim against Stonewall is not a 'new claim' but relabelling of the 'basic contravention' for the purposes of the existing s 111 claim.

17. It follows from the above that I have to consider the question of time limits in relation to the claim against the Garden Court respondents, but not against Stonewall. However, lest I am wrong in my analysis, I also consider the question of time limits against Stonewall.

18. As to time limits, I do not attempt to *decide* the time limit point now. That would require evidence and must be determined at the final hearing, if I permit the amendment. I have to consider whether there are reasonable prospects of a 'just and equitable' extension being granted under s 123 of the EA 2010 so that this substantially out of time claim falls within the jurisdiction of the Tribunal.

19. I consider first the explanation for the delay. The explanation advanced by the Claimant relies principally on the *Forstater* case (UKEAT/0105/20/JOJ). Mr Cooper on her behalf has explained, with reference to documents in the bundle, that although the Claimant was aware prior to commencing proceedings of the possibility of bringing a direct discrimination claim based on philosophical belief, she was deterred from doing so by the fact that *Forstater* was unsuccessful at first instance, and the prospect of a multi-day preliminary hearing on whether or not her gender critical beliefs met the definition of philosophical belief in s 10 of the EA 2010 was unappealing. However, in the light of *Forstater* in the EAT, in which case Mr Cooper represented the claimant (and Ms Russell the respondents), and judgment in which was handed down on 10 June 2021, it is now established that gender critical beliefs in general terms do meet the definition of philosophical belief, and the Respondent accepted as much in its Re-Amended Grounds of Resistance ([13]). This removed a significant hurdle to the Claimant bringing a direct discrimination claim and, Mr Cooper submits, the Claimant has acted so as to make the amendment at the first reasonable opportunity thereafter (i.e. this hearing, which was already listed to deal with other matters).

20. For present purposes, I take the Claimant's case at its highest and accept the above explanation of the reasons for the timing of the amendment application as genuine. There is therefore an explanation for the delay, albeit that in my judgment it is not a very strong explanation. At the time the Claimant commenced proceedings, *Forstater* was only a first instance decision and there was nothing to stop Ms Bailey trying her luck with a new first-tier tribunal. In any event there are potentially significant points of distinction between Ms Forstater's case and this one which might have given Ms Bailey hope that her case would have had a different outcome at first instance in any event.

21. I also give little weight in the context of the size of this case as it has grown to be to a reluctance by the Claimant to face a preliminary hearing on the issue of her beliefs.

22. Nonetheless, it is clear that *Forstater* in the EAT has opened the gates for this sort of claim and made it much easier for the Claimant to bring the claim that she now seeks to bring in these proceedings. The Claimant's further delay since that judgment was handed down in June 2021 is insignificant in the scope of these proceedings. Although the application could have been made earlier than 30 September 2021, the only prejudice arising from that delay is that if the Claimant had notified the Respondents earlier they could have dealt with the proposed amendment (if it was permitted) in their Re-Amended Response. Otherwise, there is no real prejudice as a result of the short delay since June as we have been able to deal with the application today, and there are still six months to go until the final hearing.

23. The explanation for the delay raises question marks regarding the legal advice that the Claimant received at the outset, but if there is fault on the

part of legal advisers that does not count against a Claimant in the context of deciding whether a just and equitable extension should be granted.

24. Ultimately, it seems to me that if the claim is found at trial to be meritorious, it is likely also to be found that it would be just and equitable to extend time for the claim. The explanation for the delay is not so weak that a just and equitable extension should be denied if the claim is meritorious, and the Claimant should not be penalised for any fault on the part of her advisers (even if she is also a lawyer herself).

25. I therefore consider that, as against both respondents the Claimant stands a reasonable prospect of establishing that a just and equitable extension should be granted if her claim is successful (and no one has suggested that the claim itself does not stand a reasonable prospect of success). The proposed amendment should not therefore be 'knocked out' because of any time limit difficulty.

26. However, I still have to consider the question of the timing of the amendment and its implications for the proceedings more generally. In this respect, I take into account that this is the Claimant's fourth attempt at pleading this case. This further amendment undoubtedly pushes up costs for Respondents. Although this hearing today was required in any event, and the proposed amendment can largely be responded to by reference to the matters already set out in the Respondents' responses (as amended), the making of the amendment application will have increased costs for today's hearing and will require some further work on the pleadings if it is granted.

27. The Claimant's explanation for the timing of the amendment application is not a strong one for the reasons I have already set out. However, the final merits hearing is still six months away. The amendment will not substantially expand the scope of the case or change significantly the preparation required to take the matter to trial. No further witnesses will be required. No further disclosure is required. There will need to be some additions to the witness statements to deal with the new claim, but these will likely be limited to an additional paragraph in the statements of the five additional staff members and Ms Davies QC to deal with their attitude to the Claimant's beliefs, and a few additional sentences in the statements of all alleged victimisers to deny (presumably) that they were motivated by the Claimant's beliefs. There will be some consequent additional cross-examination by the Garden Court respondents, but not much. There will be some additional legal submissions, but again not much as the direct discrimination claim to be added is much more straightforward legally than the existing indirect discrimination claim. I cannot see that Stonewall's case or cross-examination will be affected at all by the amendment, notwithstanding Ms Omambala's submissions.

28. I record that there was some suggestion by Ms Russell in the course of argument that there might be a need for an additional preliminary hearing on the question of whether the Claimant holds the particular beliefs she claims to hold, or that there might be scope for argument as to whether all aspects of the Claimant's claimed beliefs qualify as philosophical beliefs. However, I do not consider it to be realistic that either point would require a preliminary hearing or much additional argument. The scope for disputing whether the Claimant holds the beliefs she claims to hold appears to me to be fairly limited given the material I have already seen in this case, while arguments as to whether particular aspects of the beliefs qualify as philosophical are likely to be peripheral. If they arise at all, it will be because of some nuance in the evidence about a particular individual's reasons for acting which cannot be predicted at this stage, but seem to me to be sufficiently unlikely that I cannot give the prospect much weight in the decision I have to make.

29. I focus, finally, on the question of overriding importance: the balance of prejudice. It seems to me that the prejudice to the Claimant of not permitting the amendment outweighs that to the Respondent of refusing it.

30. This in my judgment is one of those cases such as HHJ Taylor referred to at [24] of *Vaughan* where the application for amendment reveals a weakness in the existing case. It is for that reason that I infer the parties have fought so hard over it today. The Claimant's indirect discrimination claim as it stands faces two potentially significant hurdles. First, that she needs to establish that a PCP was operated by various individuals of treating gender critical beliefs as being bigoted or otherwise unworthy of respect. The notion that individual actions/comments such as those relied on in these proceedings might add up to something that can properly be categorised as a PCP may be difficult to prove. Secondly, she needs to establish that if there was such a PCP it places women or lesbians at a disadvantage. That is a point on which there is public controversy in political terms and even if the political argument is meritorious (on which I need take no view), establishing disadvantage in such a way as to satisfy a Tribunal that it constitutes indirect discrim under the EA 2010 is likely to be difficult (although no one has suggested it is unarguable).

31. The proposed amendment removes those hurdles and reshapes the case in much more straightforward terms. It is, in short, more likely to succeed than the indirect discrimination claim as presently pleaded. It also gets much closer to the 'heart of the dispute' than the current victimisation claim, which is (as is common with victimisation claims) secondary to the primary dispute, depending as it does on her establishing that she made allegations of breaches of the EA 2010, which were understood as such and for which she was penalised. The victimisation claim is concerned with 'secondary' breaches of the EA 2010, whereas the proposed amended claim concerns 'primary' breaches. The prejudice to the Claimant of not permitting the amendment is therefore that she will be less likely to succeed (though not

doomed) and the 'heart of the dispute' will not be litigated. That is weighty prejudice.

32. The converse of course is that permitting the amendment will mean that the Garden Court respondents are facing stronger claims. I accept that counts as prejudice, albeit not prejudice to which much weight can be attached given that the interests of justice generally favour allowing potentially meritorious claims to be litigated, even ones brought outside the primary time limit if there is a reasonably arguable case for a just and equitable extension (as there is here). I cannot see that the amendment makes any real difference to the merits of the case against Stonewall. There will be little impact on any of the Respondents in terms of preparation and trial and witnesses. The extension of the listing to 25 days that I ordered at this hearing was necessary in any event without regard to this amendment.

33. There is some prejudice to the Respondents in terms of additional costs caused in responding to the application and dealing with necessary amendments to pleadings and minor additions to witness statements that will result if the amendment is permitted. This sort of prejudice is compensable by costs in a case such as this, although of course the 'unreasonable' threshold for the award of costs must be crossed. I understand that the Respondents intend to make a costs application if the amendment is pursued and I therefore express no view at this stage as to whether the threshold for a costs award under Rule 76 has been crossed, but simply note that it is arguable that it has. The limited nature of the amendment will, however, mean that the additional costs caused by it will amount to a very small proportion of the parties' overall costs in a case such as this, so even if no costs are awarded that prejudice will not be that significant (and some of those additional costs have been incurred already regardless of my decision on the amendment).

34. There is some prejudice caused by the lateness of the application because the Respondents will have been conducting proceedings to date on the basis of one view of the case, which might have been different had the claim been pleaded in this way from the outset, although no specific prejudice of this sort was identified by the Respondents.

35. I accept Ms Russell's submission that there is also potentially a greater stigma for Respondents facing direct discrimination claims than indirect or victimisation claims, although given the nature of the particular PCP relied on for the indirect discrimination claim in this case I am not sure that the stigma of facing a direct discrimination claim can really be said to be any greater.

36. Overall, in my judgment, taking into account all the above factors, the balance of prejudice in this case falls firmly in favour of permitting the amendment.

37. I add here, by way of a footnote, that when finalising the Order from the hearing on 12 October 2021, it occurred to me that in the light of the analysis of the amended pleading that we arrived at in the course of the hearing (i.e. that there were six individuals who were now being alleged to have directly discriminated against the Claimant because of her beliefs who had not previously been identified as individual operators of the PCP), that the Claimant ought to consider carefully whether there was any inconsistency in that position and whether it would be appropriate to withdraw the direct discrimination claims against those individuals (see paragraph 2.1.2 of the Order). This was merely intended to assist the parties in narrowing the dispute if possible and does not affect the view I reached on the amendment application for the reasons set out above.

The victimisation claims

38. Finally, Ms Russell objected to the further particulars provided by the Claimant of the protected disclosures pleaded at paragraph 24(a)(ii) of the Details of Claim. Paragraph 24(a)(ii) lists as protected acts *"The Claimant's tweets around the launching of the LGB Alliance"*. Ms Russell argued that as there were now 12 lengthy trails of tweets said to fall within this paragraph an amendment was required. However, it seems to me that what has happened is that the Claimant has simply provided further particulars of her existing pleading. No amendment to the pleading is required. The tweets in the existing pleading have simply now been identified. Further particularisation is, however, required and I ordered the Claimant by paragraph 2.1.1 of the Order to identify which parts of the Schedule of Tweets are said to constitute the protected acts. I understand from the Respondents' recent correspondence with the Tribunal that they are unhappy with the Claimant's further particulars in this respect. I hope the parties will be able to resolve any dispute in that regard by adopting a co-operative and proportionate approach in accordance with the over-riding objective. It would be unfortunate if another Preliminary Hearing were required to deal with that point.

Employment Judge Stout

11 November 2021

SENT TO THE PARTIES ON

12/11/2021.

FOR THE TRIBUNAL OFFICE