



EMPLOYMENT TRIBUNALS

Claimant: Miss D Trench

Respondent: Performance Bar Limited

Heard at: Nottingham (in Chambers) **On:** 19 January 2022

Before: Employment Judge Victoria Butler (sitting alone)

Appearances:

For the Claimant: written representations

For the Respondent: no written representations

JUDGMENT

The decision of the Employment Judge is:

1. The application to amend the claim to include claims for automatically unfair dismissal (whistleblowing) and victimisation against the Respondent (Performance Bar Limited) is allowed.
2. The application to amend the claim to include a victimisation claim against Mr Patel is refused.

REASONS

1. This judgment follows my judgment dated 21 September 2021 in which I refused the Claimant's application to amend her claim because no submissions accompanied the updated Grounds of Claim. At the time of considering this application, the only live claim was one of 'ordinary' unfair dismissal under sections 94 and 98 Employment Rights Act 1996 ("ERA").
2. By way of explanation, I repeat the history to the claim so far. The parties attended a closed telephone preliminary hearing before me on 14 July 2021. By this stage the Claimant had secured a legal representative who e-mailed the Tribunal on 26 February 2021 to confirm that the Claimant also claims automatically unfair dismissal for whistleblowing under section 103A Employment Rights Act 1996 ("ERA") and victimisation under s.27 Equality Act 2010 ("EQA").

3. The Claimant's position is that the claims of automatically unfair dismissal and victimisation are merely further particulars of matters already contained within the narrative in the originating claim, but I noted the following in my case management summary:

"However, the Tribunal listed the claim as an 'ordinary' unfair dismissal only and, whilst the Claimant ticked the box 'if claiming discrimination, a recommendation' in section 9 of the claim form (which asks Claimants what they want if they are successful in their claim), she did not tick any of the discrimination boxes at Section 8, nor does she mention whistleblowing in her narrative. I was of the view, therefore, that the new claims should be subject to an application to amend and I will determine it.

Importantly, the question of whether Mr Patel can be dismissed as a Respondent to these proceedings can be determined once I have heard the application to amend - as the claim stands, there is no live discrimination claim against him".

4. The Claimant's representative suggested that the Claimant was also pursuing a whistleblowing detriment claim against Mr Patel, but I saw nothing within the narrative of the email dated 24 February 2021 to indicate this to be the case.
5. The parties were agreeable to me hearing the application to amend on the papers and I made an order that the Claimant submit the application by 30 July 2021.

The application

6. The initial application to amend on 3 August 2021 comprised an amended Grounds of Claim but no accompanying submissions as to why the amendment should be allowed. Following my judgment dated 21 September 2021, those submissions were filed on 6 October 2021.
7. The Respondent was given the opportunity to respond to those submissions but, despite requesting further time to respond, failed to do so. Accordingly, I have proceeded with the application on the Claimant's submissions alone. For the avoidance of doubt, I have had sight of the Respondent's amended Grounds of Resistance filed on 20 August 2021.
8. As above, the Claimant's application is to amend her claim to include claims of i) automatically unfair dismissal by reason of whistleblowing (s.103A ERA) in that she raised health and safety concerns about PPE and breaks; and ii) victimisation contrary to s.27 Equality Act 2010 ("EQA") because she was dismissed after raising allegations of sexual misconduct.
9. The basis of the application is that the addition of these two claims amounts to a relabelling exercise and there is no hardship to the Respondent in allowing the

claim, particularly given that it has already responded to the amended Grounds of Claim.

The law

10. The starting point in an application to amend is always the original pleading set out in the ET1. In **Chandok v Tirkey** 2015 ICR 527, the EAT 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 the time limits but which is otherwise free to be augmented by whatever the parties choose to add or subject merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.”

11. In dealing with an application to amend, the Tribunal will take into consideration its duty under the overriding objective: to ensure that the parties are on an equal footing; to deal with the case in a way that is proportionate to the complexity and importance of the issues; to avoid unnecessary formality and seek flexibility in the proceedings; to avoid delay so far as compatible with proper consideration of the issues; and to save expense.

12. In **Cocking v Sandhurst Stationers Ltd [1974] ICR 650** the President held that regard should be had to all the circumstances of the case and in particular the Tribunal should *“consider any injustice or hardship which may be caused to any of the parties if the proposed amendment was allowed or, as the case may, be refused”*.

13. In **Selkent Bus Company Ltd v Moore [1996] ICR 83** the EAT held that relevant circumstances include:

“Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one

of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions e.g., in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. 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: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

14. The Presidential Guidance on General Case Management ("the Guidance") incorporates the factors set out in **Cocking** and **Selkent**.
15. In respect of re-labelling, the Guidance provides: "*While there may be a flexibility of approach to applications to re-label facts already set out, there are limits. Claimants must set out the specific acts complained of, as Tribunals are only able to adjudicate on specific complaints. A general complaint in the claim form will not suffice. Further an employer is entitled to know the claim is has to meet*".
16. Under 'Time Limits' the Guidance provides: "*The Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Where for instance a claimant fails to provide a clear statement of a proposed amendment when given the opportunity through case management orders to do so, an application at the hearing may be refused because of the hardship that would accrue to the respondent*".
17. A Tribunal can allow an application to amend but reserve any limitation points until the final hearing which might be necessary in cases where it is not possible to make a determination without hearing the evidence – **Galilee v Commissioner of the Metropolis UKEAT/0207/16**.

Time limits

18. S.123 EQA provides:

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

Conclusions – Respondent (Performance Bar Limited)

19. The Claimant's originating claim sets out clearly the factual background to the claim. On 24 October 2020, the Claimant's boyfriend, who also worked at the Respondent, resigned rather than face dismissal. Later that day, he posted allegations on Facebook that Mr Patel, the Respondent's Director, had made "*inappropriate sexual advances to both staff and customers whilst drinking, as well as how he would ignore the covid guidelines and keep the business open longer, meaning some staff members wouldn't get breaks during their shift*". The Claimant liked and shared the post, albeit says she deleted it an hour later.

20. The next day, the Claimant was called into a meeting by the Respondent to discuss her actions in liking and sharing the post. She told the Respondent that she agreed with the contents of the post and raised allegations of sexual misconduct by Mr Patel, including inappropriate behaviour towards her personally. On 30 October 2020, she was dismissed for gross misconduct.

21. Given that the Claimant alleges that she discussed the matters forming the basis of the two additional claims in her originating claim, I am satisfied that the whistleblowing and victimisation claims amount to a relabelling of existing facts already pleaded against the Respondent. Given that I am satisfied that this is simply a matter of relabelling, I am not required to consider time limits but, for the avoidance of doubt, given that the act relied on in both claims is the Claimant's dismissal, such claims were presented in time.

22. I am satisfied that there is no injustice or hardship to the Respondent in allowing the amendment given that it has already set out its response to the amendment and was aware of the facts unpinning the claims from the outset.

Conclusions – Mr Patel

Background

23. The Claimant still seeks to add Mr Patel as a named Respondent. He was initially named as a Respondent because the Claimant, who was unrepresented at the time, issued proceedings against him in error rather than the Respondent who was her employer. On 24 February 2021, the Claimant's representative requested that the Respondent (Performance Bar Limited) be added as a second Respondent, which was duly done.

24. In my judgment dated 21 September 2021, I formally dismissed the claim against Mr Patel because the Tribunal did not have jurisdiction to hear a claim against him personally.

Nature of the amendment

25. Turning to the application to amend, I have had regard to the originating claim and the amended Grounds of Claim. Within both, the Claimant raises allegations of inappropriate behaviour by Mr Patel towards her and other members of staff as background information. She does not say when they occurred, nor does she subsequently claim harassment. Her claim is confined to doing a protected act on 25 October 2020 and her subsequent dismissal.

26. In the amended Grounds of Claim, she simply says that '*for the avoidance of doubt, the Claimant claims Mr Patel was material to the decision to discipline and dismiss*' (paragraph 7). This is simply a statement without any further detail supporting why she asserts this and, in my view, does not amount to a clear statement of the proposed amendment allowing Mr Patel to know the claim against him - particularly given he was not the decision maker, nor was he present at the investigatory or dismissal meetings.

27. The first time this allegation is made against Mr Patel is within the amended Grounds of Claim and I am satisfied that it amounts to an entirely new claim against him.

Time limits/timing and manner of the application

28. The initial application to amend was made on 3 August 2021, albeit was defective. However, even taking this date, the claim that Mr Patel was '*material to the decision to discipline and dismiss*' is substantially out of time. The Claimant attended an investigatory meeting on 25 October 2020 and was dismissed on 30 October 2020. The allegation is, therefore, over nine months out of time.

29. The substantive application to amend made on 6 October 2021 asserts that it would be just and equitable to extend time to allow it to proceed because '*the victimisation claim is founded on the same facts to be heard in the unfair dismissal claim and it is not in the interests of justice to deny the Claimant access to justice in consideration of a Convention Right*'. Further, there is no prejudice because the Claimant's representative alerted the Tribunal to the fact that she wanted to make the amendment on 24 February 2021. That may be so, but the application itself, or at the least the detail of the amendment was not provided until 3 August 2021, over five months later.

30. Within the application, there is no explanation for the length of, and reasons for, the delay in presenting the claim against Mr Patel; the extent to which the cogency of the evidence is likely to be affected by the delay; the promptness with which the Claimant acted once she knew of the facts giving rise to the claim; and the steps taken by her to obtain appropriate advice once she knew of the possibility of bringing the claim. It is for the Claimant to persuade me that it is

just and equitable to extend time and she failed to do so. Further, given that the claim against Mr Patel is inadequately pleaded and the substantial delay in making the claim, the balance of prejudice would fall against Mr Patel if the time limit was extended.

31. I am satisfied that that the claim against Mr Patel is an entirely new claim, it is not adequately pleaded, it is out of time (and it is not just and equitable to extend time) and there was a substantial delay in making the application to amend. Accordingly, the prejudice and hardship to Mr Patel in allowing the amendment would far outweigh that of the Claimant if it was refused. This is particularly so because the Claimant is not deprived of bringing a victimisation claim entirely given that the claim can proceed against the Respondent.

Overall conclusion

32. The application to amend the claim to include claims for automatically unfair dismissal and victimisation against the Respondent (Performance Bar Limited) is allowed.
33. The application to amend the claim to include a victimisation claim against Mr Patel is refused.

Employment Judge Victoria Butler

Date: 20 January 2022