Case No. 2303042/2020, 2303465/2020 and 2304669/2020

EMPLOYMENT TRIBUNALS

Claimant: Mrs M Supersaud

Respondents: Gapuma (UK) Limited (1)
Mr J Badakjian (2)
Mr S Harris (3)

Heard at: London South (By CVP) **On:** 8 December 2021

Before: Employment Judge Self

Appearances

For the Claimant: Mr M Greaves - Counsel

For the Respondent: Mr A McPhail - Counsel

RESERVED JUDGMENT

1. The issue of without prejudice correspondence is adjourned with liberty to restore if the parties are unable to resolve matters themselves.

2. The only claim against R2 and R3 is the Third claim.

3. Amendments to the Claim are made as set out within the reasons below at paragraphs.

WRITTEN REASONS

1. On 15 July 2020 the Claimant entered into Early Conciliation with Gapuma (UK) Limited (hereafter R1). Early Conciliation concluded and the EC Certificate was dated 17 July 2020.

2. The Claimant lodged a Claim against R1 on 19 July 2020 (2303042/20). At that point in time the Claimant was still the Head of Accounting for R1. It is apparent from a combination of the Claim Form and the Particulars of Claim that the Claimant was looking to bring the following claims against R1:

    a) Whistleblowing detriment;
    b) Health and Safety detriment;
    c) Race Harassment.

3. Within that Claim Form the specific acts of detriment and harassment are set out and are the same for each of the three categories of claim namely:
    a) The Claimant's suspension;
    b) Contrived investigatory / disciplinary action;
    c) Reputational damage intent.

4. That Claim was sent to R1 on 1 September by the Tribunal and R1 filed their Grounds of Resistance to those claims denying them and also made a request for Further and Better Particulars of the Claim dated 29 September 2019 at the same time.

5. Meantime on 11 August 2020 the Claimant lodged a second claim (2303465/2020) against R1, R2 and R3. By this time the Claimant had been dismissed on 4 August 2020 and the Claims were:

    a) Ordinary Unfair dismissal;
    b) Automatically unfair dismissal for Health and Safety reasons (section 100 Employment Rights Act 1996 (ERA)) or Whistleblowing (section 103A ERA).
    c) Detriment claims for the same reasons as the automatically unfair dismissal claims;
    d) Sex Harassment;
    e) Wrongful Dismissal (the Claimant had been summarily dismissed).

6. The Claimant had failed to enter Early Conciliation with R2 or R3 and so according to section 18A of the Employment Tribunals Act 1996 those claims were bound to be rejected. It would appear that the Claimant realised the error and brought a third Claim (2304669/20) which, this time, was against R2 and R3 following Early Conciliation against those two Respondents starting and finishing on 19 August 2020. That Claim was lodged on 21 August 2020.

7. The only claims on Claim 3 are said to be detriment claims for Health and safety reasons and protected disclosure reasons.

8. The Respondents lodged Responses against Claims 2 and 3 again denying the allegations against them and seeking Further Particulars on 23 October 2020. They also raised an Employer's Claim against the Claimant and that has also been responded to by the Claimant in May 2021.

9. Matters were listed for a telephone hearing in order to give directions for future hearings and most importantly to identify the issues. The original date

was postponed, and the parties came before EJ Sage on 21 July 2021. From the Order it seems that discussion did not move much beyond listing the matter for mediation which was originally set down for today.

10. At some point the Claimant answered the Requests for Further and Better Particulars that had been requested by the Respondents and ordered by the Tribunal. On 30 September 2021 the Respondent wrote to the Tribunal asserting that the Particulars they had received impermissibly extended the scope of the factual enquiry and so in actual fact required permission to be given to amend the Claim. Both parties agreed to convert the mediation scheduled for today in order to iron out any issue of amendment and other issues.

11. The above describes the pathway to today's hearing. The matters that were before me at the start of the hearing was:

    a) Whether the Claimant needs permission to amend her claim and, if so, whether permission should be granted.

    b) Whether the Claimant can rely on inadmissible matters that the Respondent says were 'without prejudice'.

    c) Whether claim 2303465/2020 (Claim 2) should have been rejected in relation to Jack Bardakjian and Stephen Harris due to the absence of an ACAS early conciliation certificate number being provided.

12. The issues were further narrowed down by the advocates at the hearing. There was no requirement upon me to make a determination on the without prejudice issue as it transpired that the parties believed that they would be able to come to an agreement about this matter. It certainly should be capable of being resolved and so I will leave that issue to the good sense of the parties. If it cannot be resolved, then a further application will need to be made in good time so as not to jeopardise any timetable. I have adjourned that matter with liberty to restore

13. So far as the issue at 10 (c) above is concerned there does not seem to be a major issue or at least one of any particular importance. The second Claim can stand against R1 because there was a pre-existing ACAS Certificate which is detailed on Claim 2 as against that entity.

14. Claim 2 is not valid as against R2 and R3 because the conditions precedent set out at section 18A ETA 1996 for bringing an employment tribunal claim have not been met and none of the exceptions apply. The Claim would be rejected pursuant to Rule 10(1)(c)(i) and/or Rule 12(1)(c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

15. Claim 3 does bring a valid Claim against R2 and R3 as the previous omission has been adequately catered for because there is now Early Conciliation Certificates against both R2 and R3 and the relevant EC numbers are on the

Claim Form. It may or may not have time limit ramifications but the Claims against R2 and R3 were lodged on 21 August 2021.

16. That leaves the amendment issues to be considered. In order to consider that claim I need to consider the three Claim Forms which for the avoidance of doubt have the following as Respondents:

    a) Claim 1 is against R1 only;
    b) Claim 2 is against R1 only:
    c) Claim 3 is against R2 and R3 only.

17. In the First Claim Form it was asserted that the Protected Disclosures were "on or about 30 January 2020 and 25 June 2020". Whilst precision in every aspect of pleading claims, would be appreciated and should be striven for, one has to reside in the real world where pleadings are often produced by Claimants or non-qualified friends / acquaintances. In this case the first claim was pleaded by a Trade Union representative. At the very start of the case instructions may be imprecise and I must take into account that there is no necessity for pleadings that would stand muster in the High Court. On the other hand, of course, it is for any Claimant to set out the claim as clearly as they can.

18. Although the Request for F and BPs sought to pin the Claimant to a time on the two dates identified the pleaded case does say "on or about" those dates and I consider that the dates the meetings asserted in January 2020 and those within two days in June are sufficiently to come within the "on or about" scope. They are further particularization of the claim that enables the Respondent to defend them. No amendment is required.

19. I now move on to the race / sex harassment claims. In the First Claim there is only a race discrimination claim which is harassment and it sets out that the detriments were suspension, contrived disciplinary process etc. and reputational damage. There are no other claims of race discrimination in that document.

20. In the Second Claim only the box for sex discrimination is ticked but in the body of the claim there is a reference to race as well (paragraph 3). I am content taking the two of those together that both race and sex claims are mooted on the Form. Paragraph 3 suggests that six emails are discriminatory on the ground of sex and/or race but seeks to say that the Claimant should not be limited to these.

21. In the next paragraph (4) the Claimant states that in addition she was subjected to racist comments by others including but not limited to R2 and a single example is given. This Claim Form was drafted with the assistance of her solicitors.

22. The third claim makes no mention at all of race or sex discrimination.

23. In the Request for Further Particulars the Respondent asks (not unreasonably) about the race claims in Claim 1 by asking why the Claimant had averred that the disciplinary action she was subjected to you was because of her race. The Claimant ignores the question, withdraws one of the claims in the first Claim and states that she wishes to rely upon the race matters in Claim 2 and those that she is going to set out below at para 4.2. of the Further particulars document. It is clear that the desire to add further discrimination claims does not arise as a result of answering the question posed.

24. The Respondent then asked a question in respect of the six emails pleaded as being discriminatory in claim 2 asking the date and time sent and who was involved in the email exchange. Again, not an unreasonable request. The Claimant states that they cannot help with that but produce a further ten allegations of conduct which they assert is discriminatory but fail to specify whether sex or race is relied upon leaving the reader presumably to draw their own conclusions. These additional claims do not flow naturally from the question posed.

25. The Respondent then asks for particularization of the allegations set out at para 21 above and the Claimant indicates three of the new claims in the response to the F and BPs 4.2.2, 4.2.3, and 4.2.5 are further particulars of that claim.

26. My conclusions are as follows. I do not consider it a good practice at all for legally trained individuals (or indeed anybody) to seek to cover themselves by the phrase “including but not limited to”. It is their job to take clear and cogent instructions and to fully plead their case at the first opportunity. If they do not, then there are almost certainly going to be additional hearings such as this which are not in keeping with the overriding objective.

27. I do not accept that those words have any magic in them which would mean that additional allegations can necessarily be added at a later point as a matter of course. In this case however the Respondent did ask for further particulars of each incident when a racist comment had been made asking when it occurred and who was involved.

28. The Response came back that 4.2.2, 4.2.3 and 4.2.5 as being further particularization of that assertion. I am content that those three allegations are genuine further particulars of paragraph 4 of Claim 2. Those matters can proceed as race harassment claims and there is no need for permission to amend.

29. All of the other matters within the paragraph will need to be the subject of consideration in respect of whether the amendment sought by the Claimant to include them will be permitted.

30. The correct approach to adopt when considering an application to amend was recently considered and outlined by His Honour Judge Tayler in the EAT in the case of **Vaughan v Modality Partnership Limited (2020) UK EAT**

0147/20. Within that case the following messages were communicated, the first being that the Tribunal has a broad discretion when considering applications to amend.

31. The key test for considering amendments has its origin in the decision of **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650** at 657BC: "In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."

32. In **Selkent Bus Co Limited v Moore (1996) ICR 836** at 843D it was said "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."

33. In **Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07 (6 June 2007),** Underhill P concluded that on a correct reading of Selkent the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise.

34. The list that Mummery J gave in Selkent as examples of factors that may be relevant to an application to amend ("the Selkent factors") should not be taken as a checklist to be ticked off to determine the application, but are factors to take into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment.

35. The factors identified in Selkent should be used to identify matters that pertain to the vital issues on the balance of hardship and injustice.

36. In **Abercrombie v Aga Rangemaster Limited** (2014) ICR 209 Underhill LJ stated this important consideration, at paragraph 48: "Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry 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."

37. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise and one needs to start by considering, possibly putting the Selkent factors aside for a moment, what the real practical consequences of allowing or refusing the amendment are. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the

claim or defence? If permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions.

38. Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence.

39. Similarly, the prejudice to a Respondent will be that they have to respond to an additional claim that otherwise they would not have to meet. That will be the same for any amendment application so one has to look at prejudice over and above the base prejudice on both sides.

40. The Selkent factors are still relevant and they are:

    a) the nature of the amendment.
    b) the applicability of time limits.
    c) the timing and manner of the application.

41. The examples were given to assist in conducting the fundamental balancing exercise. They are not the only factors that may be relevant.

42. The Selkent factors must also be considered in the context of the balance of justice. For example, a minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.

43. An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

44. A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

45. No one factor is likely to be decisive and the balance of justice is always key.

46. Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.

47. An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary

expense are relevant considerations, the key factor remains the balance of justice.

48. The fact that there may be more race discrimination allegations relating to comments was presented within paragraph 4 of Claim 2. The issue presented at 4.2.4 is an allegation of widespread discrimination relating to the pay of the Claimant and others. It has no relation to paragraph 4 and would require a substantial amount of evidence to determine over a substantial period. I consider that the balance of harm for this allegation falls with the Respondent who suddenly would have a wide-ranging pay issue involving several individuals which they have not had proper notice before. I am not prepared to amend the Claim so as to permit this to go for a hearing as the prejudice to the Respondent is too great.

49. The Claimant reserved its position in respect of "racist comments" but did not make any suggestion that there were additional sex related comments or actions. It is not helpful that the Claimant's solicitors have not clearly indicated whether each allegation is race, sex or both which again is just an example of slack pleading practice.

50. It seems to me that 4.2.1, 4.2.6, 4.2.6.1, 4.2.6.2 and 4.2.7 are all allegations of sex discrimination which have been outlined for the first time in the Further Particulars. They are new claims, were not foreshadowed in the original pleading and are not linked in any meaningful way to the Sex Discrimination emails. I have no real explanation as to why these matters could not have been originally pleaded. They are pleaded a substantial period outside the primary limitation period and again I consider that the balance of harm falls on the Respondent. The Claimant is left with many claims that she can pursue, and these were not deemed sufficiently serious or necessary to plead at the correct time. They are not a minor amendment but serious allegations against members of the respondent's staff. The application to amend in respect of these is rejected.

51. My conclusion is that only the race matters at 4.2.2, 4.2.3 and 4.2.5 of the Further particulars will be considered as issues in the case. With the guidance I have given the parties are requested to indicate by no later than 14 days from the date of receipt of this Judgment as to whether they wish to be considered for judicial mediation and what further directions are required to prepare this matter for a final hearing. The parties need to agree a list of issues as soon as possible and submit the same to the tribunal for its consideration. The List of issues should be agreed by no later than 28 days after receipt of this Order. A further Telephone Preliminary Hearing will be listed.

Employment Judge Self
9 February 2022