Case Number: 2304925/2020

EMPLOYMENT TRIBUNALS
BETWEEN

Claimant ***Respondent***

Ms S Langhan **AND** Development Pathways Limited

OPEN PRELIMINARY HEARING

HELD BY CVP **ON** 8 February 2022

EMPLOYMENT JUDGE TRUSCOTT QC

Appearances

For the Claimant: Mr E MacDonald of Counsel

For the Respondent: Ms H McLorinan of Counsel

JUDGMENT on PRELIMINARY HEARING

The claimant's application to amend her claim is refused.

REASONS

Preliminary

1. A case management preliminary hearing was listed for 8 February 2022. By consent, part of the hearing was converted to an open preliminary hearing in order to hear the claimant's application to add a personal injury claim.

2. A new bundle of documents was provided to the Tribunal which will be referred to where necessary.

3. The claimant provided a written skeleton argument in support of the application [65].

The amendment proposed

1. The Grounds of Complaint narrative attached to the ET1 narrates "The claimant does not pursue a claim for personal injury in these proceedings but will claim recovery of same before the civil courts and reserves the right to do so" [32]. The narrative was prepared by counsel for the claimant.

2. The claimant seeks to amend her Grounds of Complaint by deleting Paragraph 126, which reads:

> "The Claimant does not pursue a claim for personal injury in these proceedings . . ."

And by replacing the same with:

> "The Claimant avers that, by reason of the tortious treatment complained of above, she sustained an exacerbation injury (in the alternative, a psychiatric injury), as detailed in the Report prepared by Dr Gibbons following examination on 8 March 2021 and finalised on 13 March 2021, and claims damages for the same."

And by adding new sub-paragraph 127(d) to read:

> "d. Personal injury."

3. Counsel for the claimant explained at the hearing that the reference to tortious treatment was to the victimisation claim. This is set out here as taken from the agreed list of issues for the hearing:

Victimisation

Did the Claimant do a protected act by sending her resignation letter of 7 May 2020?

If so, did the Respondent subject the Claimant to a detriment because she had done a protected act or because it believed that she had done, or might do, a protected act? The Claimant relies on those detriments particularised above which post-date May 2020.

4. The detriments as particularised above are as follows:

a. The pressure applied to her to complete the Haiti project
b. Requiring her to work while furloughed
c. Being told that she would only be entitled to statutory sick pay from 6 April 2020 and being placed under pressure to be "back working"
d. The language used by the Respondent employees, and in particular by Mr Kidd, e.g. "seriously there is no issue here . . .why is it a problem to fill in certificates like anyone else?" and "absolutely nothing is inappropriate apart from your reaction."
e. Referring in the e-mail of 29 April 2020 to the Haiti report being "well behind schedule" and to "reputational damage"
f. Inviting the Claimant to a disciplinary meeting by e-mail sent on 6 May 2020 which referred to "performance . . ." and "how to approach the next few weeks and months given that you don't have any fee paying work lined up."
g. The continued demands and pressure imposed by the Respondent throughout
h. The failure to show any or any adequate concern for the Claimant's welfare

i. The suggestion made by Mr Kidd that she had inappropriately claimed sick pay
j. Failing to pay the Claimant in full during her period of sick leave.
k. The invitation to what appeared to be a disciplinary hearing (by e-mail sent on 6 May 2020)
l. The refusal to permit the hearing to be recorded and the demand that the Claimant attend at short notice notwithstanding her objection
m. The Respondent's insistence on conducting a formal grievance process despite no grievance having been raised by the Claimant
n. The threats to report the Claimant to the police
o. The deductions from the Claimant's pay.

5. The application to add a personal injury claim to the ET1 was made initially by a reference in a case management agenda for a case management preliminary hearing on 9 April 2021 and formally on 19 August 2021 [64]. That case management hearing also decided that there should be an open preliminary hearing to determine whether the claimant was a disabled person in accordance with section 6 of the Equality Act 2010. That issue was determined at a hearing on 29 June and 25 November 2021. The Tribunal held that the claimant did not meet the definition of disability in the Equality Act in a judgment dated 8 December 2021.

Amending the claim

6. Employment tribunals have a general discretion to grant leave to amend the claim. It is a judicial discretion to be exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions'. General guidance on making amendments to a claim is contained in **Selkent Bus Co Ltd v. Moore** [1996] ICR 836 EAT and **Cocking v. Sandhurst (Stationers) Ltd** [1974] ICR 650 NIRC. There is a distinction which requires to be drawn between:

(i) Amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint. Amendments falling within this category are not affected by the time limits, as the nature of the original claim remains intact, and all that is sought to be done is change the grounds on which that claim is based, i.e. re-labelling.

(ii) Amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim. As Harvey notes at paragraph 312.01 in relation to this type of amendment: *"*So far as category (ii) is concerned, the tribunals and courts have always shown a willingness to permit a claimant to amend to allege a different type of claim from the one pleaded if this can be justified by the facts set out in the original claim. It is usually described as putting a new 'label' on facts already pleaded.

(iii) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

7. In essence, **Selkent** said that whenever the discretion to grant an amendment was invoked, "a tribunal should take into account all the circumstances, including but not limited to the nature of the amendment, the applicability of time limits and the timing and manner of the application]" before balancing "the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it." This approach was

approved by the Court of Appeal in **Ali v. Office of National Statistics** [2005] IRLR 201.

8. In **Vaughan v. Modality Partnership** [2021] ICR 535 EAT, Tribunals were reminded that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application.

9. When considering whether to allow an amendment, an employment tribunal should analyse carefully the extent to which the amendment would extend the issues and the evidence. Although the allegations in the original claim and in the amendment were not identical, Rimer LJ, giving the only reasoned judgment of the Court, held that 'the thrust of the complaints in both is essentially the same'. The fact that the whistleblowing claim would require an investigation of the various component ingredients of such a case did not mean that 'wholly different evidence' would have to be adduced. **Evershed v. New Star Asset Management Holdings Ltd** [2010] EWCA Civ 870 at para 50.

10. There is also Presidential Guidance.

CONCLUSION

11. In summary, the claimant's submission was that the amendment is minimal, that the respondent is not faced with any new facts, the proposed amendment goes essentially to remedy, were the claimant to succeed on liability, both the respondent and the Tribunal would in any event need to inquire as to the impact of any proven acts of discrimination on the claimant (i.e. in assessing injury to feelings), that the respondent should be faced with no real practical problems in responding, that the amendment does not add to the need for witness statements, documentary evidence, etc. and that the hardship to the claimant of refusing the amendment would be substantial, were she to succeed on liability, she would be deprived of the opportunity adequately to be compensated for the statutory tort of discrimination.

12. The respondent opposed the application on four bases, that the amendment was not properly pleaded, it is significant, it cannot be dealt with before the hearing, the claimant is seeking alternative redress and the application is made late.

13. There are no time limit issues. The amendment sought was so minimal that, on the face of it, in order to understand it, counsel for the claimant had to explain the basis of it, that it arose from the victimisation claim. If the amendment had been fully pled, rather than by signposting, it can be seen as a substantial amendment raising the issue of causation at a number of stages. The Tribunal considers that the proposed amendment, short and innocuous as it may seem, is not. The claim is a difficult one to analyse. Even with the explanation provided to the Tribunal, it does not give fair notice to the respondent.

14. Although it was said that the amendment is primarily directed at remedy, there would have to be consideration of evidence in respect of which there are existing claims but in a different legal context in order that the required level of causation might be established, this might include psychiatric evidence which might address not only

causation but the extent of exacerbation. Psychiatric evidence would not be available for the hearing or for a very long time thereafter.

15. From the time of drafting of the particulars for the ET1, civil proceedings were contemplated, the initial stages have now been commenced, solicitors and possibly counsel are instructed by the insurers for the respondent but these are not the same solicitors and counsel involved in this hearing. If she is successful, she will be able to recover damages in those proceedings. This was obviously what was originally contemplated for the claimant. There was no good reason advanced as to why that should not remain the case whereas there are very good reasons why the employment tribunal hearing should not be expanded at this stage.

16. In the claimant's skeleton argument in explanation of the delay in making the application it is said "C has needed carefully to consider the relationship between the amendment applied for, on the one hand, and an intimated claim for personal injury in the civil courts, on the other. C does not waive privilege in respect of advice received, but notes that there was (and is) a legally nuanced point here which required time to consider." The Tribunal is not suggesting that the claimant is barred from changing the position intimated in the ET1 but counsel had pled the case extensively at the ET1 stage and the "legally nuanced point" did not appear to arise from any change in the law or circumstances. The Tribunal also noted that the decision to hold that the claimant was not disabled did not change the decision to seek to make the amendment or the basis of it. The Tribunal is not satisfied that the claimant has given a satisfactory explanation of why there is reliance on the amendment.

17. The main hearing is currently listed for 8 days in early April 2022. The existing claim is extensive with time allowed to accommodate breaks for the claimant. Final case management orders have been issued along with the agreed list of issues. The Tribunal considered whether it would be appropriate to remove remedy from the issues to be addressed at that hearing in order to accommodate time for the amended claim but the preparations for the hearing which was listed for liability and remedy in April 2021 are well in hand and could lead to the final conclusion of this claim being substantially delayed. This is unlikely to be in the best interests of the claimant.

18. The claim as currently pled is potentially valuable as the claim would be if amended. As such, it runs the risk of diverting the attention of the Tribunal away from a claim that is itself important to an ancillary claim.

19. The Tribunal considers that the respondent is likely to be prejudiced by the introduction of arguments on causation which are not stated in detail which will inevitably require time to answer, possibly including instructing a psychiatrist which again would introduce delay.

20. In all the circumstances, the Tribunal concluded that the balance of injustice and hardship weighs heavily in favour of refusing the amendment.

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Employment Judge Truscott QC
Date 11 February 2022