EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: S/4104499/2018

Held in Glasgow on 3 October 2018

Employment Judge: J D Young

Mr J Farrell — **Claimant**
Represented by:-
Mr B McLaughlin - Solicitor

Asda Stores Limited — **Respondent**
Represented by:-
Mr R Alexander - Solicitor

DECISION AND REASONS

The **Decision** of the Employment Tribunal is that the application by the claimant to amend his ET1 is allowed so that the notice of claim is as set out in the statement of claim attached to the e-mail to the employment Tribunal of 23 July 2018; and the **Order** of the Employment Tribunal is (a) that respondent, if so advised, shall within 21 days of the date of intimation of this Decision intimate a response to the notice of claim as amended and (b) that a further (telephone) preliminary hearing be fixed to determine future procedure.

E.T. Z4 (WR)

REASONS

Background

1. The claimant presented a claim to the Employment Tribunal on *4* May 2018 alleging that he was unfairly dismissed and discriminated against on the grounds of disability and sex. A response was submitted by the respondent on 4 June 2018 in which they disputed all the assertions made by the claimant.

2. By letter of 13 June 2018 the claimant's representatives were directed by Employment Judge Mark Whitcombe to provide further information as set out in that letter. In particular full details of the discrimination claims were sought and if the claimant sought to amend the claim (as suggested in the ET1) then that should be intimated by 26 June 2018.

3. By e-mail of 26 June 2018 a proposed amendment to the ET 1 was intimated to the Tribunal (and the respondent). By e-mail of 5 July 201 8 the respondent provided an objection to the claimant's proposed amendment. At a Preliminary Hearing of 13 July 2018 a direction was made that there would be a Preliminary Hearing to deal with the proposed amendment to the ET1 .

4. In the meantime it was confirmed for the claimant that the complaint of disability discrimination was to be withdrawn. A Judgment was issued by the Employment Tribunal on 1 August 2018 dismissing that complaint.

5. By e-mail of 23 July 2018 the representative for the claimant intimated (and copied to the respondents) a "clean copy" of the proposed amended notice of claim.

Documentation

6. At the Preliminary hearing the respondent produced an Inventory of Productions numbered 1 - 6 8 (paginated R1 - 221) and written submissions. Each party also produced authorities upon which they would wish to rely.

The Hearing

7. At the preliminary hearing submissions were made by the representatives on the application for amendment and objection. I was grateful for the care and clarity of those submissions. No disrespect is intended in making a summary.

Submission for the Respondent

8. The claimant submitted the ET1 on 4 May 201 8 and in section 8.1 of that form indicated by "ticking the relevant boxes" that he was making a claim for unfair dismissal, wrongful dismissal, sex discrimination and disability discrimination. It was submitted that the claimant did not provide any particulars in regard to his claim for sex discrimination.

9. The terms of the proposed amendment were as set out in the letter dated 26 June 2018 to the Employment Tribunal (R37/38) and as identified in the proposed amended notice of claim at paragraphs 33-36.

10. Reference was made to the case of **Selkent Bus Company Limited v Moore [1996] ICR 836** as the primary case to be considered when a Tribunal exercised its discretion in relation to an application to amend a claim. The key principle was to take account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. A number of "relevant circumstances" were identified to be taken into account being :-

(a) The nature of the amendment i.e. whether it was minor, added factual details to existing allegations or the addition or substitution of other labels for facts already pleaded; or whether it was a substantial alteration making entirely new factual allegations which changed the basis of the existing claim.

(b) If a new complaint or cause of action was proposed to be added to consider whether that application was out of time and if so whether time should be extended under the applicable statutory provisions

(c) The timing and manner of the application. It should be considered whether the application should have been made earlier.

The nature of the amendment

11. It was submitted that the application made was a substantial alteration pleading a new cause of action. It was stated that the claimant now made new factual allegations. While the claimant had "ticked the box" to indicate he believed he had been discriminated on the grounds of sex no particulars had been provided in the ET1 other than in paragraph 20 of his paper apart (R19) which provided a general statement that the claimant was "discriminated against and dismissed contrary to the Equality Act 2010".

12. It was submitted that the facts set out in the application of 26 June 2018 were substantially different to those originally provided. The issues set out in the original ET 1 related to the claimant's failure to return to work around mid/late December 2017 following a period of absence on 23 August 2017. The original paper apart commenced the position from 23 August 2017 and did not provide information prior to that time.

13. On the other hand the proposed amendment related mainly to the period prior to 23 August 2017 before the claimant was absent from work. In particular the issues set out relate to the claimant's rota or shift pattern which the claimant stated resulted in him becoming unwell and suffering a detriment. It was submitted that the Tribunal should take into account these different matters of fact and the substantial difference between the factual and legal issues raised. In that respect reference was made to Abercrombie and **Others v Aga Rangemaster Limited [2014] ICR 209** at paragraph 48 where it was stated :-

> "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 in 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."

It was submitted that the proposed amendment could not be said to expand or provide further specification but introduced an entirely new set of facts.

Time limits

14. It was acknowledged that it was not always necessary for the Tribunal to determine statutory time limit issues as part of deciding an application to amend. Allowing an application would not deprive a respondent from making time bar arguments in relation to the direct discrimination claim. An application to amend could be decided subject to any time bar points **(Galilee v Commissioner of Police of the Metropolis [2018] ICR634).** However it was submitted that the issue of time limits should be considered in determining whether or not an application to amend should be allowed. That would save expense and delay and be in accordance with the overriding objective.

15. It was submitted that the claimants complaints related to a rota that he was working up to 23 August 2017 at which time he commenced a period of sickness absence. The rota was not worked after that date but a new rota was agreed on 8 December 2017 which complemented the claimant's childcare commitments with an agreed return to work date of 15 December 2017.

16. It was stated that the last act of alleged discrimination would have been 23 August 2017 and so the sex discrimination claim should have been intimated by 22 November 2017. Thus the claim was well out of time. It would have been out of time even if it was deemed to have been presented on 4 May 2018 alongside the original ET1 being 5 months after the expiry of the time limit. On the basis that the discrimination claim was a new cause of action the claim was presented on 26 June 2018 with the proposed amendment and so over 7 months after the expiry of the time limit.

17. Even if the last act of discrimination was when the new rota was agreed namely 8 December 2017 the discrimination claim should have been lodged by 7 March 2018. By not particularising the claim until 26 June 2018 the claimant was again out of time.

18. The claimant's representatives stated that they were only instructed on short notice i.e. shortly prior to submitting the ET1 on 4 May 2018. But no explanation had been offered as to why instructions were not provided earlier or why the claimant could not set out the detailed factual matrix for his proposed discrimination claim himself. It was submitted that the failure to provide adequate details until 26 June 2018 was not sufficient to justify the Tribunal accepting the claim out of time.

19. Reference was made to **Harvey v Port of Tilbury (London) Limited [1999] ICR1030.** In that case the amendment represented the addition of a new cause of action and as the claim had been made out of time it was not just and equitable to allow it.

Timing and manner of the application

20. Reference was made to **Ladbrokes Racing Limited v Traynor EATS 0067/06** and the guidance as to how a Tribunal may take into account the timing and manner of an application in the balancing exercise namely:-

    (a) Why was the application not made earlier.

    (b) If the amendment is allowed what delay would ensue and whether there were likely to be additional costs due to the hearing being lengthened if the new issue was allowed.

    (c) Whether the delay means evidence was no longer available.

21. No explanation was provided as to why the application had been made in June 2018 rather than when the original ET 1 was presented. The facts must have been within the knowledge of the claimant at that time.

22. In the event the amendment was allowed delay would ensue as the respondent would require a period of time in which to take instructions on the new facts which it was submitted were extensive, to gather information and documentation, and draft an amended paper apart. In the meantime case management orders would require to be postponed. The estimated length of the Hearing might be 4 days rather than 2 days. The overriding objective required amongst other things that cases were dealt with expeditiously and in a way which saved expense (Martin v Microgen Wealth Management **Systems Ltd EAT0505/06).**

23. Also witness evidence might be more difficult. In that respect if it was clarified that a further witness beyond those identified in the previous Agenda for the Preliminary Hearing would be required. The enquiry into the circumstances would be more intense.

Other factors

24. While Selkent had identified certain factors these were not intended to be exhaustive. In particular it was submitted it was appropriate to consider the merits of the proposed sex discrimination claim and whether it had any reasonable prospects of success. The claimant had not after commencement of his sick leave in August 2017 or prior to that date advised the respondent that he believed he was the subject of sex discrimination. Once the claimant raised the issue of his rota causing him issues with childcare commitments after commencing his sick leave the respondent worked with the claimant to **agree** a new rota. **In Olayemi v Athena Medical Centre and Others EAT0613/10** one of the factors an Employment Judge took into consideration was that "the prospects of success on this claim do not appear good" (paragraph 49).

25. In all the circumstances the application would disproportionately prejudice the respondent. The claimant had a claim for unfair dismissal and was in the reasonable position of relying on that existing claim.

26. If the application were allowed a further Preliminary Hearing should be determined to consider the issue of timebar and whether the claim has no reasonable prospects of success. If the application was allowed then the respondent would require 28 days in which to amend its ET3 grounds of resistance. It was also stated that the respondent reserved the right to apply for costs in respect of this application.

Submission for the Claimant

27. It was submitted for the claimant that the entire chronology of events should be considered. The appellant was dismissed on 19 January 2017 and then engaged with the internal appeal process. Naturally he hoped he would be reinstated as a consequence. The respondent's appeal process was detailed and the claimant completed the second stage by 19 April 2017 when a final decision was made.

28. Accordingly he had a short period (19 April - 4 May 2017) to make his claim to the Tribunal. He engaged with the Union procedure for assessment of claims immediately. That process took until 2 May 2017 and the Union instructed their solicitors on 2 May 2017. The claimant to protect his position had entered early conciliation procedures on 7 March 2018 which procedures were concluded by 7 April 2018.

29. Essentially the unlawful act of discrimination alleged took place through to 8 December 2017 and the remit to the early conciliation was made within the 3 month period. It was submitted that the last act of discrimination was 8 December 2017 when the fresh rota had appeared which took account of the appellant's childcare responsibilities. The consultation in that respect took place through from 23 August 2017 - 8 December 2017. Reference was **made to Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/16/LA** (paragraph 42). in support of the proposition that the discrimination in this case was ongoing until 8 December 2017.

30. The late instruction to submit the complaint to the Tribunal meant that the claim did indicate that there was a claim of sex discrimination by ticking the

relevant box. The factual position was outlined and while elaborated on in the proposed amendment the matters were foreshadowed in paragraph 1 of the original ET 1. The claimant had been responsible in dealing with the matter expeditiously in having the disability discrimination claim withdrawn to ensure a saving of time and expense.

31. It was submitted that in the narrative of events it was clear that the claimant had engaged with the respondent in submitting an application for flexible working and in August/December 2017 discussion ensued regarding his rota.

32. Reference was made to a meeting between the respondent and the claimant on 9 November 2017 (R127) wherein discussion took place on the claimant providing a "Care 4 Kids form". That form was then submitted on 10 November 2017 wherein the claimant indicated that the reason he was seeking flexible working was because:-

> "I am applying for flexible working because my partner and I both work and we require flexible working time so we can balance our childcare."

33. In that application he made it clear that his need was to finish at 5pm for childcare arrangements. That was at the essence of this claim.

34. Thus there was information within the documents that had been produced already regarding this whole matter. The Inventory of Productions that had already been prepared and produced by the respondent in respect of the claim did not need to be amplified. The unfair dismissal/discrimination case was already contained within the Inventory produced.

35. Reference was made **to Newstart Asset Management Holdings Limited v Evershed [2010] EWCA Civ 870.** In that case the EAT had considered that the new amended claim would not involve a substantial increase in the scope of the factual enquiry. That was the position here. Essentially the whole issues would require to be explored in any event in the unfair dismissal claim. There would be a need to look at the background and what was the behaviour and conduct of the parties at the relevant time to assess the issue of whether or not the dismissal was unfair.

36. In this case there was no substantial delay. The amendment had been submitted in good time. The case was at a very early stage. The ET1 had been presented on 4 May 2018 and on initial review an Employment Judge had indicated that further and better particulars should be issued by 26 June 2018. Those directions were followed. No dates had yet been fixed for any hearing or preparations made for witnesses.

37. There was a need to be precise and careful in the proposed amendment and that had been done. The initial response in the ET3 from the respondent (R28) made reference to the rota and the resolution of the issues around the working hours. The respondent was well aware of the issues.

38. The Agenda prepared for the Preliminary Hearing of 13 July 2018 had identified witnesses relating to the discrimination claim (R61). It was there stated that the respondent's "People manager" would give evidence on the claimant's discrimination claim. Essentially the same people were involved and it was not seen how the evidence could be extended for a further 2 days.

39. This case was different from **Remploy Limited v Abbott and Others UKEAT/0405/14** wherein the amendment was refused essentially because it came too late in the day when a merits Hearing had been fixed and the amendment sought not long before the Final Hearing date. Those circumstances were not in play here. There was no Final Hearing fixed and no prejudice in that respect. Indeed the amendment had been sought quickly and promptly. There would be no effect on the memories of the witnesses.

40. In all the circumstances it was submitted that the amendment should be allowed.

Conclusions

Initiating claim and response and proposed amendment

41. The initiating claim by the claimant in this case presented on 4 May 2018 indicated that the claim was for unfair dismissal and sex discrimination (it also claimed disability discrimination but that has now been withdrawn). In the

claim it was indicated that the claimant required to go off work with stress as from 23 August 2017 and that prior to that time:-

> "The claimant raised his concerns with the respondents regarding his working pattern for 9 months prior to being signed off work. On certain shifts the claimant expected to finish at 5.15pm as per his rota agreement, however on occasions he would be put on additional duties meaning he was not able to finish work at that given time. The claimant had informed the respondent that he was not able to undertake duties which took him past his finishing time due to childcare commitments. On a number of occasions the claimant was not able to finish work as per his rota and therefore his partner was not able to attend her work at very short notice. This not only caused severe stress and anxiety for the claimant but this also impacted severely on his home life and relationship. The claimant was initially advised by his doctor that he should take time off in July due to the circumstances of his health. However the claimant went against the advice of his doctor and remained at work. The claimant did not want to take time off work as he enjoyed his working life as it kept him busy." (Paragraph 4 of the statement of claim).

42. Thereafter, the claimant narrates the circumstances of his intention to return to work but the death of his grandmother intervened. He states he explained that position to his manager and explained he would not return to work on the intended date but would return when his sick line expired. Despite that he was dismissed because he had not made a return to work on 15 December 2017 being when he had initially agreed to return. The subsequent appeal hearings were then narrated and the notice of claim states that the claimant's agents were only instructed on 2 May 2018 and had only been "able to consult with the claimant briefly on date of submission. We are therefore only able to submit this skeleton application at this juncture. With the leave and permission of the Tribunal the claimant will seek to amend his originating application to the Tribunal on sight of the respondent's ET3." The statement of claim indicated a complaint of unfair dismissal and that the "claimant had

been discriminated against and dismissed contrary to the Equality Act 2010" (R16/19).

43. That was followed by the respondents submitting their ET3. Within that response it is confirmed that the claimant was dismissed for his failure to "return to work on a date agreed between the claimant and the respondent following an extended period of sickness absence." They state that his initial absence was claimed to be due to his shift pattern being a "source of his anxiety, as the timings of his shifts sometimes clashed with his childcare schedule." The respondents advised that several meetings were held with the claimant in order to support and facilitate his return to work and "how his rota could be adjusted to fit in with his childcare commitments. The options suggested by the claimant were fully investigated and discussed with the claimant." The response indicates that a proposed new rota to accommodate the claimant was agreed on 8 December 2017 and the agreement was that the claimant would return to work on 15 December 2017. The claim form denied there was any discrimination on the grounds of sex. In the response it was stated that there had been a failure to "particularise or provide any information in relation to" that claim.

44. The Employment Judge who gave initial consideration to the claim advised that the claimant's representative should by 26 June 2018 provide:-

> "1. Full details of the claim for sex discrimination and disability discrimination.
>
> 2. If the claimant seeks permission to amend the claim (as suggested in paragraph 16 of the paper apart) then that application must be made in writing attached to a full draft to amend the claim not later than 26 June 2018." (R35)

45. That prompted the proposed amendment. In that amendment the claimant had amplified his concerns over the shift pattern and rota which he was working. He states that the inability of the respondents to adhere to his rota meant that he could not meet the childcare commitments from time to time

and the stress of juggling the competing needs of the respondent, his partner and his son led to a breakdown in his health. Accordingly he made application under the "Care 4 Kid" policy for a guaranteed finishing time that allowed him to meet his childcare commitments. However he states that application was not granted and he was not advised of the outcome.

46. He states that he received less favourable treatment because of his gender. He states that if he had been a woman with childcare commitments he would not have been "expected to work overtime and work beyond his agreed finishing times and change shifts with little to no notice" and neither would this position have been "allowed to remain unresolved for a period of around 9 months" he states that an application for "Care 4 Kids" would have been processed and considered had he been a woman who had childcare commitments. He does not believe that the genuineness of the effect of this problem on his health or his need for leave and intention to return would have been questioned if he had been a woman with childcare commitments. He relies on a hypothetical comparator and believes that a woman in the same or not materially different circumstances would not have suffered the less favourable treatment he received. He states that he continued to suffer discrimination "up to and including his dismissal".

Considerations on proposed amendment

47. In determining whether to grant an application to amend the cases advise that an Employment Tribunal should 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 - **Selkent Bus Co Ltd v Moore.** In that case relevant factors to consider were outlined. As was noted **in Trimble and Another v North Lanarkshire Council and Another EATS0048/12** the balance of hardship and injustice test is a balancing exercise. That needs to be put in context and needs to be looked at in the whole surrounding circumstances. In **Transport and General Workers Union v Safeway Stores Ltd EAT0092/07** Mr Justice Underhill (as he then was) considered that although there was a new claim

almost all the facts material to the new claim would already have been in the claim already made. Whether or not it was right to describe the new claim as "mere relabelling" was not decisive; the important point was that it depended on facts which were, substantially, already alleged.

The nature of the proposed amendment

48. This was a first key factor identified **in Selkent Bus Co Ltd.** In this respect a Tribunal has to decide whether the amendment is one of the minor matters or is a substantial alteration pleading a new cause of action.

49. In this case the claimant has "ticked the box" in indicating that a claim of sex discrimination would be pursued. There is certainly some foreshadowing of such a claim in paragraph 4 of the initiating claim form wherein he complains that for "9 months prior to being signed off work" rather than finishing at 5.15pm per his shift rota he would be given additional duties and that meant he was unable to get home to attend to childcare commitments. It is however mainly pled as background to his reason for going off work with stress and anxiety rather than being positioned as a discrimination claim. Simply "ticking the box" might give an indication that a claim is to be made but it would not be sufficient to form the basis of that claim or to answer the questions "how, in what way, and in what respects?".

50. Accordingly I could not consider that here the issue was "mere re-labelling" but that there was being asserted the basis of a claim which was not made out within the initiating ET1. The issue then is what weight that might carry against allowing amendment. As the Court of Appeal in **Abercrombie v Aga Rangemaster Limited** stressed, considering the judgment in **Selkent** as a whole, the Judge was not advocating a formalistic approach. In that case it was indicated that tribunals should focus "not on questions of formal classification but on the extent to which the new pleading is likely to involve substantial 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."

51. In this case the extensive Inventory of documents produced by the respondent seem to contain all that would be necessary to argue the merits of the sex discrimination claim. In that respect there would not appear to be a need for any substantial, or indeed any, further enquiry into what documents would be required.

52. Additionally it is clear that the claimant is to raise issues involving his rota at work as providing the reasons why he was absent from work from 23 August 2017. The respondents indicate that they sought to discuss matters with the claimant and have resolved in the period August/December 2017 the issues around rota so that a return to work could be made. These are issues which would be encompassed within the unfair dismissal claim and it does not seem to me that substantial further enquiry would require to be made in relation to the sex discrimination claim which is now proposed by way of amendment. Essentially the same ground will be covered.

53. I accept that in a sex discrimination claim the investigation and focus will be different and more intense as regards the tension between rota finishing times and the impact on childcare commitments but not sufficiently substantial to mean that the amendment should be refused on that basis. There would not be a requirement to investigate and produce wholly different factual evidence. There is little difference between the "factual and legal issues raised by the new claim and by the old"

Relevance of time limits

54. The second factor identified in Selkent was whether or not if a new complaint was to be added it was out of time. It is important to note that the weight of authorities suggests that the fact that had the amendment incorporating a new claim been a free standing claim it would have been out of time is not an absolute bar to allowing it. It is a factor to consider in the balance when considering how to exercise discretion **(Transport and General Workers Union v Safeway Stores EAT092/07).** Additionally as was submitted in **Galilee v Commissioner of Police of the Metropolis** while it was necessary to know whether a new claim was out of time in order properly to exercise

discretion it was not always possible to determine the point prior to or at the same time as the application to amend where an evidential investigation was necessary, particularly in discrimination cases. That case indicated that the question of whether or not a cause of action was time barred was not a matter which need be determined within an application to amend. The application to amend could be granted leaving open the issue of whether or not the new cause of action was time barred.

55. In this case the position put by the claimant in the proposed amendment is that the discrimination on the grounds of sex continued until the date of his dismissal being 19 January 2018. The alternative position put in the course of submission was that even if the last act of discrimination was 8 December 2017 when the rota was agreed between the respondent and the claimant thus taking care of childcare issues then the initiating application claiming sex discrimination would still have been in time given the operation of section 207B of the Employment Tribunal Act 1996.

56. The difficulty with that proposition is that I find that there is a new cause of action being submitted in terms of the amendment (albeit foreshadowed) because the original ET1 did not set out the basis of the discrimination claim.

57. Accordingly the new cause of action was raised on the date of the amendment being 26 June 2018. In my calculation the date that claim should have been raised to preserve the 3 month time limit (taking into account section 207B of the 1996 Act) is 7 May 2018. Thus the claim is time barred.

58. The issue then becomes whether it would be “just and equitable” to extend the time. The information on that is that the appeal process in which the claimant was involved concluded in April 2018 at which time he had his case assessed by his Trade Union and they promptly instructed solicitors to present the initiating claim. They did so and did "tick the box” to indicate a discrimination claim was being made. They also indicated that they had limited time in which to prepare the initiating application and that an application to amend was likely. They then did respond in time to the letter

from the Employment Judge indicating a timescale in which further particulars and/or amendment should be intimated.

59. Those circumstances would in my view form good grounds for there to be an extension of the time limit on the just and equitable provision. However I accept that would be to deal with the matter on a test of "probability" and an evaluation of the argument succeeding which according to **Galilee** would be an error of law (para 106/107) I accept the point made by the respondent that there was no evidence form the claimant to indicate why he had not sought advice earlier and what he did to avoid difficulties in time limits. The position adopted in Galilee was that the approach of the Court of Session in the case of **Edinburgh City Council v Kaur 2013 SC 48** be followed and that in cases involving extension of time on a "just and equitable" basis the issue should, barring the clearest case, "be the subject of a final decision reached after hearing the evidence". On the basis of the available information I consider that there are grounds to say it may well be "just and equitable" to extend time to 26 June 2018 and so would not refuse the application for amendment on the grounds of time limits. At the same time that is a matter which would require to be reserved.

Timing and manner of application for amendment

60. The third factor in **Selkent** related to the extent to which the applicant has delayed making the application to amend.

61. In this case I do not consider that there has been any undue delay by the claimant. In **Ladbrokes Racing Ltd v Traynor** the EAT gave some guidance as to how a Tribunal may take into account the timing and manner of an application in the balancing exercise. In that respect:-

- There has been an explanation given as to why the amendment was made on 26 June 2018 and not earlier. I have rehearsed the factors which brought about the claim being made early May 2018 with notice that an amendment would come and reasons why the initiating claim was not fulsome. It is not an amendment which is

made late in the Tribunal process itself It comes within a reasonable time of the ET1 being lodged and certainly within the timescale indicated by the Employment Judge on an initial consideration of the claim.

- It is not clear that delay will be occasioned by allowing the amendment. If the respondent wishes to bring a claim that the sex discrimination case has no reasonable prospect of success (as indicated in their written submission) then that is a matter for them but it should not unduly delay matters.

- It was not submitted that evidence was not available on this claim. Indeed as indicated the evidence seems inherently included within the claim for unfair dismissal. It is accepted that there would be a more intense focus on the whole question of the shift rota and its effect on childcare but do not see the respondent being put in a position where evidence is unavailable or of a lesser quality.

62. As indicated I consider that essentially on the same ground will be covered in relation to the claim for unfair dismissal as it will be in relation to the claim of sex discrimination. I consider that the length of Hearing will not be unduly prolonged. It may be lengthened to some extent but not in my view to an extent that the balance of hardship is tipped in favour of the respondent against the appellant not being able to pursue his claim.

Other factors

63. It was submitted that the merits of the discrimination claim should be considered. I consider that Tribunals considering the prospects of success in the context of an application to amend should proceed with caution particularly where the amendment brings in a discrimination claim which are notoriously fact sensitive. The appeal courts have stressed that a Tribunal should tread warily in any application for strike out of a discrimination claim on the ground that it can only be properly assessed after evidence has been adduced. It would not be my view that the claim should be regarded as having

such little prospect of success that I should consider that factor favoured the respondent in the balancing exercise on hardship.

Decision

64. In all the circumstances therefore I consider that the amendment should be allowed. The overall balancing exercise is to weigh the competing prejudice of hardship. The hardship for the claimant is clearly that he could not proceed with a claim which he did indicate in his initiating application he would make. The hardship for the respondent is that they have to face that claim. At this stage no final date of hearing has been fixed. The evidence may require an additional witness from the respondent but it would not appear that evidence would be unduly extended as a consequence of allowing the amendment. As indicated the documents already produced would cover the evidence on the claim of unfair dismissal as well as the claim relating to sex discrimination.

65. In the first instance as the amendment is allowed the respondent should be ordered to respond to the claim as amended within 28 days of intimation of this decision. Secondly it would be appropriate to have a further closed Preliminary Hearing by telephone with the respective agents to discuss future procedure. The time bar point is, as explained, still live. It may be the respondent wish a further preliminary hearing to resolve that matter.

Employment Judge: J Young
Date of Judgment: 12 November 2018
Entered in register: 14 November 2018
and copied to parties