



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms D Robson

**Respondent:** Mayborn (UK) Ltd

**Heard at:** via CVP at Newcastle Employment Tribunal

**On:** 25, 28, 29, 30 June 2021, 1, 2, 5, July 2021, 17, 18, 19, 20,  
21, 24 January 2022, 23 February 2022

10 and 11 March 2022 - in chambers

**Before:** Employment Judge Jeram, Mr Gallagher and Mr Shah

**Representation:**

Claimant: in person

Respondent: Mr Andrew Webster of Counsel

**JUDGMENT** having been sent to the parties on 17 June 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. On Wednesday 19 January 2022, during the giving of evidence by the respondent's witness Ashleigh Vaughan, the respondent voluntarily disclosed to the claimant documents recording interviews of 5 of the claimant's former colleagues, and the supporting meta data of those documents.
2. On Thursday 20 January 2022, the claimant made a written applications to strike out the respondent's response, or amend her claim to add a claim of victimisation.

3. The supporting meta data of two documents suggested that they had been both created and last saved on the same date i.e. 6 February 2020, by Ashleigh Vaughan. One of those interviews was of Justine Cain.
4. A further two interviews were, again according to the meta data created in early February 2020 and last saved on 9 April 2020 by Tracey Elvin. Ms Elvin was called as a witness for the respondent.
5. The meta data for the fifth, undated, document, recording an interview of Anne Armstrong, suggested that the document was both created and last saved on 9 April 2020 by Tracey Elvin. The document entitled '*grievance points investigation notes*' and consisted of a short exchange about the circumstances in which AA brought a Christmas gift for her colleague, Chris Beeley. That issue was, or became, the subject matter of a grievance that the claimant had originally submitted on 4 February 2020. The grievance outcome letter was dated 17 March 2021 and claimant submitted appeal on 23 March 2021; the appeal outcome letter was dated 30 April 2021.

### **Application to strike out the respondent's case**

6. It was against the disclosure of the documents and the meta data for these interviews that the claimant sought to strike out *'the statements and where appropriate the evidence of Tracey Elvin, Ashleigh Vaughan, Justine Cain and Anne Armstrong on the basis that they all had knowledge of the existence of and participated in the concealment of [page numbers] G1200-G1211'* She further sought the striking out of all the other witness statements prepared with the assistance of the respondent's previous in house counsel Ms Cathy Smith *'as they were prepared unreasonably and in bad faith'*.
7. After discussion, the claimant clarified that she contended that the documents had been deliberately concealed by, specifically, *'the respondent'* and Ms Smith (the respondent's in-house counsel who had left employment in or about April 2021), and that she therefore applied to strike out the response on the basis that the manner in which the proceedings had

been conducted by or on behalf of the respondent had been scandalous, unreasonable or vexatious – rule 37(1)(b).

8. Alternatively, she contended that the response should be struck out on the basis that it is no longer possible to have a fair hearing of the claim – rule 37(1)(e).
9. The applications were refused.
10. The grievance outcome letter was dated 17 March 2020; it specifically addressed the claimant's complaint about the circumstances in which Anne Armstrong had given to Chris Beeley a Christmas present, in a manner which was entirely consistent with the contents of the short interview with Anne Armstrong. The outcome letter referred to *'interviews with a number of colleagues'*. There was no general duty to disclose those documents to the claimant during the grievance process, but the fact of interviews were conducted, was itself plain from a reading of the outcome letter.
11. In this litigation, one interview, with Chris Beeley, had in fact been disclosed to the claimant. The claimant advanced no basis, other than speculation, that the respondent via Ms Smith had disclosed to her Mr Beeley's interview, but deliberately withheld or concealed the others: *'I don't know what her motive was [for not disclosing] because we haven't spoken to her'*. The claimant was unable to state how, had she been in possession of the documents any sooner, she would have conducted her case any differently. We were unsurprised by this response; the disclosed documents do not appear to support the claimant's case, nor do they undermine the respondent's case. We ourselves cannot see any obvious motive for deliberately concealing the existence of the documents from the claimant. We were not satisfied that the respondent had behaved unreasonably as distinct from simple oversight, much less that there had been any deliberate concealment. For these reasons, we dismissed the application that the response be struck out because of the manner in which the case had been conducted.

12. Further and in any event, we were not satisfied that a fair hearing was no longer possible. The respondent's witnesses were in the process of giving evidence. When she initially sought the documents the claimant said she foresaw the need to recall the respondent's witnesses; upon receipt of the documents, however, the claimant informed the Tribunal that she did not wish to defer her applications until after she explored matters further with Justine Cain (once recalled with the respondent's agreement), with Ashleigh Vaughan who was mid-way through giving her evidence, or in due course, Anne Armstrong. We saw no basis for the claimant's contention that there had been '*cheating*' for the reasons set out above. The Tribunal reminded the claimant that it was open to her to explore further with the witnesses any explanation, innocent or otherwise. The claimant declined to do so and sought to have determined her application to strike out the response on the basis that a fair hearing was no longer possible. The application was at best premature. We considered that it was open, for example, for the claimant to explore with Anne Armstrong whether she was interviewed before 17 March 2021, as the grievance outcome indicated, or at a later date, during the appeal stage, as the meta data might suggest.

### **Application to Amend**

13. The claimant sought to amend her claim to add claims of victimisation.

14. The amendment, after discussion the claimant was as follows. That her grievance of 4 February 2020 amounted to a protected act. Because of the protected act, the respondent, she contended, subjected her to three detriments: that the respondent conducted interviews with her five colleagues, that in doing so, they were asking about her behaviour rather than her grievance, and that the documents were deliberately concealed from her. The claimant alleged that seven perpetrators were responsible for this conduct, four of whom were already witnesses for the respondent, and three of whom were not (Steve Parkin, CEO, Louise Rich, Head of HR, Cathy Smith, in-house counsel, who left employment in around April 2021). Furthermore, the claimant contended that in order to advance her claims, she would require further time to prepare, further disclosure, and possibly legal representation. She did not wish to issue separate proceedings and

have the matter dealt with separately. Mr Webster for the respondent submitted that the amendment was likely to give to problems securing witness evidence from, for example, Ms Smith and may – he put it no higher than that - give rise to issues of privilege. Lack of merit, he submitted, was a relevant factor.

15. The application to amend the claim was refused. We took into account the guidance set out in *Selkent Bus Co Ltd v Moore* [1996] ICR 836 and *Vaughan v Modality Partnership* [2021] ICR 535. The allegations were new allegations i.e. that in response to her grievance, the respondent explored areas about her conduct beyond the scope of her grievance; it was not a simple relabelling exercise of another pre-existing claim. The application was made timeously and as soon as the claimant was aware of the existence of the additional documents; that is a relevant factor when considering the applicability of time limits.

16. We considered the core test of the balance of injustice and hardship in allowing or refusing the application. These proceedings have been lengthy, consisting of hundreds of separate legal allegations and significant amounts of disclosure. At the time of the making of the application, the evidence was days from conclusion. Allowing the application would necessitate a separate and discreet set of allegations being advanced afresh, leading to significant delay, whilst disclosure and further witness evidence was prepared. That further evidence, whether from all those who the claimant names, or only some, may well include evidence from Ms Smith who is no longer in the respondent's employment and may give rise to issues of privilege. In short, the impact was an indeterminate period of delay to the current proceedings.

17. Conversely, it was open to the claimant her to simply issue separate proceedings in what are a discreet set of claims. That would enable her to secure the legal representation she said she may require, as well as enable the current litigation to conclude. The claimant indicated that she did not wish to issue separate proceedings, and instead sought to have her application determined, even at the risk of compromising her ability to issue proceedings at a later stage.

18. We considered that the balance of injustice and hardship was such that we refused the application. The claimant's rights to advance her new victimisation claims were capable of being protected by issuing proceedings in the usual way. The claimant accepted, or perhaps more accurately did not dispute, that the disclosure of these documents had no effect on the preparation of the current proceedings. We did not consider it proportionate or appropriate to delay the current proceedings so as to enable the claimant to amend to add the very claims that it was open to her to pursue in separate proceedings without causing further and indeterminate delay in these proceedings. We considered the likely impact of allowing her to amend the claim as having the potential to derail the current proceedings.

19. For the reasons above, the application to amend her claims was refused.

Employment Judge Jeram

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Date: 20 July 2022