EMPLOYMENT TRIBUNALS

Claimant: **Miss H Paul**

Respondent: **The Department for Work and Pensions**

Heard at: **Cardiff by CVP** **On: 25 July 2022**

Before: **Employment Judge C Sharp**

Representation:
Claimant: Mr J Castle (Counsel)
Respondent: Mr J Edwards (Counsel)

ORDER having been sent to the parties on 26 July 2022 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The Claimant's application to amend her claims made on 16 May 2022 was determined at today's hearing. Oral reasons were given, as were summary reasons in the case management order to assist later judges to understand what happened, but these are the full written reasons for the Tribunal's decision to permit some amendments and to refuse others. These reasons should be read in conjunction with my order of 25 July 2022.

2. The case had previously been dealt with a preliminary hearing on 19 April 2022 by Employment Judge R Powell where both parties were legally represented. At that hearing, EJ Powell directed that only one claim was before the Tribunal, namely failure to make reasonable adjustments. The claim he recorded was centered on a provision, criterion or practice about the removal of a security card from the computer when an employee is not present at their workstation and on the physical feature of the arrangement of her workstation (having to bend down to her keyboard). There was nothing about any other reasonable adjustment claim recorded. EJ Powell noted that the

Claimant had insufficient service to bring an ordinary unfair dismissal claim and that one of the consequences of the alleged failure to make reasonable adjustments was the dismissal of the Claimant.

3. The parties were directed to notify the Tribunal and the other side by 29 April 2022 if they thought that the list of issues set out by EJ Powell were incorrect; they did not. This means I am bound to follow the Order of EJ Powell as one judge cannot overrule another within the Tribunal, though directions can be amended by another if there has been a change of material circumstance (Serco Ltd v Wells [2016] ICR 768).

4. Due to the order made by EJ Powell and because no party sought a variation of his Order by 29 April 2022, I considered that all the claims set out in the amended grounds of complaint not within his order are new and should be treated as applications to amend. This is dealt with in more detail in paragraph 4 in my order of 25 July 2022. If EJ Powell did not identify a claim during his hearing with the parties' representatives, and that order has not been challenged, I view his order as directing that the other matters within the ET1 are background unless the matter was plainly not considered at all by him or already subject to an attempt to amend; this has an impact as the Claimant is now saying some of the "new" claims were always in the ET1.

5. I proceeded on the basis that the Claimant sought to make the following amendments to her claim:

    5.1 to amend the ET1 section 12 to record that the Claimant is disabled;

    5.2 S15 Equality Act 2010 ("EqA") discrimination arising from disability as set out in paragraphs 21 – 23 of the draft amended statement of case sent to the Tribunal on 16 May 2022;

    5.3 additional claims of failure to make reasonable adjustments relating to part-time working in paragraph 24, the sit-stand desk and floor move in paragraph 25 and a laptop and equipment set out within paragraph 26 of the draft amended claim (and as supplemented by paragraphs 27-28);

    5.4 S27 EqA victimisation claim as set out within paragraphs 29 & 30 of the draft amended claim;

    5.5 an automatic unfair dismissal claim under s103A Employment Rights Act 1996 ("ERA") as set out within paragraphs 31-38 of the draft amended claim, asserting that the Claimant had been dismissed due to the making of a protected disclosure.

6 The hearing had been listed for an hour, which I indicated to the representatives was in my view very little time and I encouraged them to be succinct. I had before me the benefit of extensive written submissions from the Claimant's representatives, and Mr Castle also amplified his submissions for approximately 40 minutes (which included answering my initial questions having read the whole file). Mr Edwards made oral submissions for about 15 minutes, and I adjourned to make my decision. I thank the representatives for staying approximately 30 minutes late to enable me to make my decision, deliver it and deal with consequential case management order.

Law

7 I bore in mind the Employment Tribunals (England and Wales) Presidential Guidance Note 1 on amendments and the primary case authorities, particularly that of Selkent Bus Company Ltd v Moore [1996] ICR 836 and Vaughan v Modality Partnership [2021] ICR 535 (which build upon the earlier authorities). It is well-established that regard should be had to all the circumstances, and in particular any injustice or hardship which would result from the amendment or the refusal to amend.

8 The Selkent case set out a non-exhaustive list of factors to be considered, namely the nature of the amendment, the applicability of time limits, and the timing and manner of the application to amend. The Presidential Guidance reiterated the Selkent factors, but noted that there is a distinction to be drawn between applications to amend which add new claims essentially out of facts that have already been pleaded, i.e. "*relabeling*", and applications to add new claims which are entirely unconnected with the original claim. Between these two extremes are cases where the facts are pleaded, but not the claim.

9 Another relevant issue for me to consider was whether to extend time to allow any new claims claim to be pursued within the amendment application. In that regard, s111 of ERA and s123 EqA state that a claim must be brought within three months of the act complained of, and the latest act to be complained of in this case was the dismissal on 27 May 2021. Bearing in mind that the amendment application was not fully set out until 16 May 2022, it was lodged outside the required time frame and therefore I may need to consider whether it would appropriate to extend time on the "*not reasonably practicable*" and *"within such further reasonable period"* for the claim of automatic unfair dismissal and "*just and equitable*" basis for the discrimination and victimisation claims. In that regard, I was mindful of the case law in this area, notably that of Porter v Bandridge Ltd [1978] ICR 943 and Bexley Community Centre v Robertson [2003] IRLR 434, which noted that time limits are to be complied with, that there is no presumption in favour of the exercise of the discretion to extend time, and that extension is the exception rather than the rule. For all the new claims, the onus is on the Claimant to demonstrate why time should be

extended. However, it is possible for a tribunal to allow an amendment to proceed but leave the issue of time to the final tribunal to determine on the basis it will be better placed to decide whether to extend time having heard all the evidence (Galilee v The Commissioners of Police for the Metropolis [2018] ICR 634).

10 I also took into account the direction provided by the case of British Coal Corporation v Keeble [1997] IRLR 336, and the indication that the factors applicable in applications to amend in civil cases under s33 of the Limitation Act 1980 may be considered. That Act directs that a court should consider the prejudice that each party would suffer having regard to all the circumstances of the case, with particular factors being the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected; the extent to which the opposing party has cooperated with any request for information; the promptness with which the claimant acted when they knew of the facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice when they knew of the possibility of taking action.

11 I also noted the guidance provided by the case of Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, that the application of the s33 factors does not require the tribunal to be satisfied there was a good reason for the delay, but that the reason advanced is a relevant matter. I bore in mind the case of Hutchinson v Westward Television Ltd [1977] IRLR 69, which said that a tribunal is entitled to take into account anything it considers relevant.

12 The other relevant law I considered is how time limits for failure to make reasonable adjustments claims operate. The duty to make reasonable adjustments requirement under s20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage (Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194 CA). A failure to make reasonable adjustments claim is an omission and the time limit runs from when the decision was made by the employer not to make the adjustment or when the employer does an act inconsistent with doing the omitted act (Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170 CA). The tribunal should view the matter from the perspective of the claimant – if the claimant does not know that the respondent is doing nothing and reasonably believes steps are being taken, time does not run until the claimant reasonably should have known no action would be taken (Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA). It is essential that a claimant pleads the relevant dates in their claim to enable the tribunal to know if the claim is in time.

Amendment to ET1 Section 12

13 In relation to the application to amend the ET1 Section 12 at the tick box to record that the Claimant is disabled, there was no objection by the Respondent and therefore that amendment is permitted by the Tribunal.

Amendment – addition of s15 EqA claim

14 In relation to the discrimination arising from a disability claim, I am satisfied that having carefully reviewed the ET1 this is a relabeling exercise and not a new claim. The facts that underlie this particular claim are within the ET1 and I allow for the fact that the ET1 was prepared by the Claimant when she was unrepresented. It is quite clear from the ET1 that the Claimant was not happy that she lost her job and thought that this happened because matters connected to her disability were not sufficiently taken into account by the Respondent, and the failure to make reasonable adjustments led to her dismissal. The Claimant also said within the ET1 that these matters underpinned the official reason for her dismissal related to her disability; in other words, the reason why her computer was unlocked was due to her disability. Indeed, EJ Powell recorded this point in his order. He was aware of the desire to amend the claim, but not in respect of this specific claim. The s15 claim which the Claimant seeks permission to bring is her explanation why her workstation at home was unattended while the security card allowing its use was within it, which is the "*something*" arising from her disability, while the unfavourable treatment she allegedly suffered all relate to this point.

15 I considered carefully whether EJ Powell's order prevented me from permitting this claim to proceed. I took the view that his focus was on the failure to make reasonable adjustments claim and neither party had raised the issue of s15 before him. I considered this a change of material circumstances and that I was able to allow the amendment, having taken the above points into account.

Amendment – additional failure to make reasonable adjustment claims

16 In relation to the additional failure to make reasonable adjustments claims, there is a reference to the Claimant being refused a move in the office from floor 1 to floor 8 and part-time working in the ET1 and that these are discriminatory acts. I am satisfied that the fact of the move refusal was pleaded in the ET1. However, EJ Powell did not find that this was a claim set out within the ET1 despite his focus on s20/21 EqA, and it appears that Mr Fry who appeared on behalf of the Claimant at that hearing did not object at the time; the file shows me that he did not write to the Tribunal to do so by the deadline set by EJ Powell and Mr Fry's application to amend simply included this new claim (and the other new failure to make reasonable adjustment claims) without any explanation given or formal application made referring to these claims (he concentrated on victimisation and automatic unfair dismissal). It is on this basis

that I have treated it as an amendment application; if the Claimant's position is that EJ Powell's Order is incorrect as these additional s20/21 claims were already before the Tribunal due to the ET1, she should have sought a variation of the Order by 29 April 2022, not slip the additional claims within a wider amendment application.

17 As time is one factor to consider for an amendment application, the question as to whether these claims were out of time must be considered if they were not brought in time by the date the ET1 was presented to the Tribunal (and certainly arises if the application date of 16 May 2022 is used as the presentation date). The ET1 was not issued until 23 September 2021; the Claimant did not approach ACAS until 24 June 2021 (early conciliation ended on 2 August 2021). At the latest, this allegedly reasonable adjustment regarding the floor move should have been done by the time the Claimant left the office to work from home due to the pandemic in January 2021 (according to Mr Castle who represented the Claimant today). This means that the Claimant should have approached ACAS by the end of April 2021; she did not.

18 The Claimant is silent about when the part-time working request was made in the ET1 (though it was mentioned); the amended particulars are equally silent. For the same reasons set out above given EJ Powell's order, I have treated this an amendment application. Again, time is one factor to consider amongst others.

19 It is for the Claimant to show that the claim has been brought within time; she has not. Nothing has been said as to when the Claimant asserts the reasonable adjustment was refused or the Respondent acted in a way incompatible with making the adjustment. The Claimant's representatives did not argue that there was a series of continuing acts; in fact, their written submissions did not even acknowledge that the draft amended grounds of complaint were trying to bring additional claims of failure to make reasonable adjustments and a s15 claim (this was conceded before the judge at the hearing). The Tribunal therefore proceeds on the basis that the Claimant's claims in relation to the floor move and part-time working were brought too late to the Tribunal when the claim form was issued (given the latest possible date for the floor move of January 2021 and the information given about part-time working in the ET1), and there is no argument being raised regarding a series of continuing acts.

20 The nature of the amendments are to bring additional claims in respect of matters factually pleaded and in addition to a claim already before the Tribunal (s20/21). They are additional matters not central to the core of the Claimant's complaint, which is in my view about her dismissal, and pre-date the matters she is most concerned about.

21 I have considered the issue as to whether it is just and equitable to extend time for these claims. No reason has been given to extend time by the Claimant and

these claims do not relate to the issues before the Tribunal. The Claimant had the benefit of legal representation for some time before the application was made; no explanation why the application was not made earlier has been provided. The prejudice to the Claimant would suffer if refused an extension appears to be little, given the claims already before the Tribunal, while the Respondent would have to deal with new matters some time before the key events surrounding the Claimant's dismissal. I am not satisfied therefore that it would be just and equitable to extend time. I remind myself that the onus is on the Claimant to persuade me to extend time and no argument or explanation has been given on this point. Taking all the circumstances into account, permission to bring these two claims regarding the floor move and part-time working is refused.

22 In relation to the reasonable adjustment about the provision of a sit/stand desk, the desk is referred to in the ET1 (but it is not clear whether it was referred to as background or as a claim), but no date at all has been given in relation to this matter. Again, for the reasons stated above in paragraph 16, I have treated this as an amendment application, which means time is one factor to consider. I do not know for certain from the ET1 whether this alleged refusal relates to when she worked from home, but I accept it may be so from the context within the ET1. No information has been provided when the Claimant asserts this reasonable adjustment was sought and refused, but it is likely to be when she first moved to working from home in January 2021 (if this assumption is incorrect, the responsibility is on the Claimant and her representatives to have properly pleaded the relevant dates). Therefore, it is difficult for me to make a firm finding about time, but I proceed on the basis that the refusal was in January 2021. The onus is on the Claimant to show that the claim is in time, and if not, seek an extension of time. This point is not addressed by the Claimant, despite being legally represented. The Tribunal adopts its reasoning as set out above in paragraphs 20 and 21.

23 However, in relation to the failures to make reasonable adjustments at paragraph 26, which center on a working laptop and the equipment while working at home (the reference to equipment is to an adequately sized desk that would allow the Claimant to remove the security card), I am satisfied that these points are within the ET1 (to the extent that I would regard it as relabeling); these matters are central to the dismissal claim now before the Tribunal. I consider the addition of the s15 claim to be a change of material circumstance from when EJ Powell considered the case, allowing me to take the view that I can consider that relabeling has occurred. Permission is given to allow this amendment. I also considered if time was an issue as the Claimant again has failed to plead when the reasonable adjustments should have been made. I took the view that if time was an issue, it would be just and equitable to extend time as these points were central to the Claimant's case and her dismissal in particular. The Respondent would suffer no real prejudice while the Claimant would struggle to put her full case on this issue before the Tribunal if

the amendment was not permitted. I also bore in mind paragraph 20 above. Permission is given to bring this claim.

Amendment – automatic unfair dismissal claim

24 Turning to the victimisation and the automatic unfair dismissal claims, permission to bring these claims is refused. I am not satisfied that they are relabeling; as Mr Edwards pointed out, these are entirely different claims dealing with different factual matters. EJ Powell was aware that the Claimant wished to bring these additional claims when making his Order.

25 In relation to the automatic unfair dismissal claim, there is nothing in the ET1 that would indicate to a reasonable person with knowledge of employment law that there is a whistle blowing claim within it. While the Claimant was not represented at the time, it is not difficult to say "*I lost my job because I told somebody something*" or words to that effect, or to say what the protected disclosure was in factual terms The points that are set out in the ET1 in my view do not obviously relate to whistleblowing or set out the facts that the Claimant will need to establish to succeed in such a claim.

26 As the application to bring this claim was not made until 16 May 2022, it is out of time. The test to extend time to bring such a claim is the *"not reasonably practicable test*". Mr Castle's answer to this point was the Claimant is impecunious (no evidence was provided); this is not the same as meaning that the Claimant could not manage to issue the claim – the ET1 shows that she could and did. Mr Castle also added that as the Claimant complained of "*coercion*", this meant she was forced to give a false confession, so time should be extended. I was not persuaded that the use of the word "*coerced*" is enough or has the meaning Mr Castle submitted. A person can be coerced into giving a true confession; the word coercion means "*forced*", it does not mean false. In any event, I did not see how this argument assisted me – the question was whether it was reasonably practicable for the Claimant to bring the claim of automatic unfair dismissal in time. There was no evidence before me on which I could find that it was not, and so time should not be extended.

27 I also considered whether the Claimant would suffer any prejudice in not being permitted to argue the whistle blowing claim. I was not persuaded that there was - the issue of her dismissal will be addressed by the s15 claim that I have given permission to be brought. The Respondent would suffer prejudice if the claim proceeded as it would have to address matters not within the ET1 and new legal issues, such as whether there was a protected disclosure. Taking all matters into account, I concluded that permission to bring this claim should be refused.

Amendment – victimisation claim

28 In relation to the victimisation claim, I am not persuaded that it is merely relabeling of an existing claim; it is a completely different claim with different legal and factual issues than those within the ET1. EJ Powell made the same point in his Order that this claim appeared to be fresh but was poorly pleaded so he would not determine it (and ordered a full application to amend was made). This meant that an amendment application was required, and the relevant factors must be considered by me. The claim has been brought out of time due to the date of the amendment application, and there has been no satisfactory argument made as to why time should be extended. Even in the amended statement of case, it is not explained how the acts asserted are protected (it seems to be the Claimant's position that merely asking for a reasonable adjustment is a protected act but it is not set out how i.e. which provision of s27(2) is engaged, how seeking a reasonable adjustment meets the S27 test, and whether Parliament intended the provisions of s20/21 to automatically equate to a protected act under s27 – without such an explanation, the Tribunal is left to guess).

29 Considering the balance of prejudice, I am not persuaded that the Claimant suffers any prejudice in not being permitted to bring such a claim as her case at its core is about her dismissal and the alleged failure to make reasonable adjustments, which will be considered by the Tribunal at the Final Hearing. It is worth remembering that the Claimant was dismissed due to her sister accessing DWP records using the Claimant's unattended computer, and it appears to be this dismissal that has triggered all the claims she seeks to bring. In contrast, the Respondent will suffer the same prejudice if the claim proceeds as outlined above when considering the automatic unfair dismissal claim – there is no basis within the ET1 to support a victimisation claim which is a very different claim to the claims before the Tribunal, both legally and factually. Taking all matters into account, I concluded that permission to bring this claim should be refused.

Employment Judge C Sharp
Dated: 17 August 2022

REASONS SENT TO THE PARTIES ON 19 August 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche