



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Ms Colleen Hubbard

v

**The Royal Marsden NHS
Foundation Trust**

OPEN PRELIMINARY HEARING

Heard at: London Central Employment Tribunal (CVP)

On: 7 October 2022

Before: Employment Judge Brown

Appearances

For the Claimant: Miss A Gumbs, Counsel

For the Respondents: Ms M Stanley, Counsel

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The judgment of the Tribunal is that:

- 1. The Claimant has permission to amend her claim as set out in her amended Grounds of Complaint sent to the Tribunal on 13 June 2022**

This Hearing

- 1. This Open Preliminary Hearing was listed to determine:**
 - 1.1. Whether Claimant has permission to amend her claim as set out in writing**
 - 1.2. Whether the Claimant has complied with direction 8 of the Tribunal's order dated 20 May 2022.**
- 2. The parties were told that case management orders could also be made.**
- 3. The background to this hearing is as follows.**
- 4. By a claim form presented on 7 March 2022, the Claimant brought complaints of Unfair (Constructive) Dismissal, Direct Discrimination on the grounds of pregnancy/maternity and detriment for a reason related to maternity leave. She set**

out a narrative in 30 paragraphs, which she said had given rise to her constructive dismissal.

5. In her maternity discrimination claim she relied on the following alleged unlawful acts (now at renumbered paragraph [36] of her amended grounds of complaint):
 - a. The Respondent failing to investigate, or look into her Grievance;
 - b. The Respondent failing to communicate with the Claimant throughout her maternity leave;
 - c. The Respondent failing to inform the Claimant about changes within her team, to her maternity cover and concerning her role and responsibilities whilst on maternity leave;
 - d. The Respondent informing the Claimant's maternity cover that there would be a restructure to the role's responsibilities, but failing to inform the Claimant;
 - e. The content of the meeting on 12 November, where Rachael (the Claimant's manager) withheld / failed to tell the Claimant vital information about her role and responsibilities and changes that were planned / going to happen that affected her position and her team;
 - f. The content of the meeting on 12 November where Rachael effectively forced the Claimant to resign by making her believe the issues around the Charity would not be resolved, despite knowing that changes were planned which would have resolved this and the Claimant's concerns;
 - g. The Respondent's failure to provide any support and/or assistance to the Claimant throughout her maternity, during the meeting on 12 November to assist in her return, or on her return to the workplace;
 - h. The Respondent deleting the Data;
 - i. The Respondent failing to include the Claimant in the discussions about the restructure following the return from her maternity leave, but including her maternity cover in those discussions;
 - j. The way in which the Respondent handled the Second Grievance.
6. At a hearing on 20 May 2022, the Claimant indicated that she wished to amend her claim to include an unfair dismissal (not constructive dismissal) claim; she asserted that she had been deceived by the Respondent into resigning from her employment, and an Automatically Unfair Dismissal claim pursuant to s.99 Employment Rights Act 1996.
7. The Claimant's position was that her amendment would be a matter of adding facts and relabelling and would not alter the substance of the claim. The Respondent disagreed.
8. At the hearing on 20 May 2022 EJ Galbraith Martin ordered the Claimant to present her written amendment by 10 June 2022 and the Respondent to respond to the application by 1 July 2022. The Claimant also agreed to provide further and better particulars by 10 June 2022 of the specific events, by reference to date, relied upon by the Claimant in support of her Unfair (Constructive) Dismissal complaint. The Claimant sent her written amendment application and further particulars to the Respondent and Tribunal on 13 June 2022 (no point was taken on the slight delay).
9. Her amended claim added the following to her constructive dismissal complaint::

“33. In the alternative... the Claimant will maintain that at the...meeting on 12 November, and afterwards, she was essentially tricked into resigning, as outlined in the chronology above. She will contend that her resignation was obtained by deception to mean that she was actually dismissed by the Respondent, (with reference to Greens Motors (Bridport) Ltd v Makin, unreported 16.4.86. CA and Caledonian Minina Co Ltd v Bassett and anor I987 ICR 425, EAT).

34. The Claimant will in turn maintain that such dismissal (either constructive or by deception) was unfair.

35. The Claimant will, based on the background that has been outlined above, maintain that the reason or principal reason for her dismissal was because she took a period of maternity leave and therefore contrary to section 99, however, if the Tribunal do not agree she will maintain that it is unfair contrary to section 98, in any event.”

10. I heard submissions from both parties at this hearing. There was no evidence from the Claimant. There was a bundle of pleadings and correspondence. I read relevant documents in it.

The Parties' Contentions

11. Miss Gumbs for the Claimant contended that the amendments amounted to a relabelling of facts already pleaded. She drew my attention to the existing maternity discrimination complaints in paragraph [36] and paragraphs [23] and [24] of the existing grounds of complaint. Paragraph [24] said, “The Claimant will maintain that her maternity- cover was informed about the planned restructure, and separation of the Charity work prior to her as Rachael wanted to retain her instead of the Claimant. Rachael had used the call on 12 November to engineer the Claimant's resignation, deliberately withholding information she had given to her maternity cover, and making her believe that there was no resolution to the problem with the Charity and the toxic working environment.”

12. Miss Gumbs said that no new factual enquiry would be needed pursuant to the amendment and that the application for amendment had been made at an early stage of the proceedings.

13. Miss Gumbs confirmed that the Claimant relies only on the allegations in new paragraph [36] – the maternity discrimination allegations – as the grounds for contending that the dismissal was for an automatically unfair reason under s99 ERA 1996.

14. Ms Stanley opposed the amendment, saying that two new factual enquiries would be necessitated by the amendment – first, who ended the Claimant's employment, as the Claimant now says that it was not she who terminated her employment and second, new causal enquiry as to the reason for any dismissal and whether it was for the prohibited reasons under s99 ERA 1996. Ms Stanley said that the amendment did not constitute relabelling. She said that, considering the balance of prejudice, if the amendment was not allowed the Claimant would simply not be able to run the claim she wants to run, but she had been represented by solicitors

throughout and it had not been explained why this amended claim had not been brought in the original particulars of claim.

Relevant Law

15. In deciding whether to allow an amendment the Employment Tribunal is guided by the principles set out in *Selkent Bus Company v Moore* [1996] IRLR 661. In deciding whether to grant an application to amend, the Tribunal must balance 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. Relevant factors include the nature of the amendment: applications to amend range, on the one hand, from correcting clerical and typing errors and the additional factual details to existing allegations and the additional substitution of other labels for facts already pleaded to and, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.
16. Other factors include the applicability of time limits: if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and if so whether the time limit should be extended. Other factors to be considered include the timing and manner of the application: an application should not be refused solely because there has been a delay in making it, as amendments can be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made, for example the discovery of new facts or new information appearing from the documents disclosed on discovery.
17. Even if there is an entirely new claim presented out of time the Claimant may still be allowed to amend, taking into account the balance of injustice and hardship. In considering whether to allow an amendment the Tribunal should analyse the extent to which the amendment would extend the issues and the evidence, *New Star Asset Management Holdings Limited v Evershed* [2010] EWCA Civ 870.

Discussion and Decision

18. I gave permission to the Claimant to amend her claim as set out in her amended Grounds of Complaint sent to the Tribunal on 13 June 2022.
19. The Claimant made clear that the basis of her s99 automatic unfair dismissal claim were the existing maternity discrimination allegations.
20. The amendments attached new labels to factual allegations which had already been made in the original pleadings.
21. First, the Claimant now contends that the alleged engineering of her dismissal, pleaded in the existing paragraph [24] and in the existing allegations of maternity discrimination at sub paragraphs e. and f. , constituted a dismissal by the Respondent, rather than led to her constructive dismissal. The relevant facts have already been pleaded and no new factual enquiry is required. The legal question

for the Tribunal is whether, if those facts are proven, that amounted to a dismissal in law by the Respondent.

22. Second, the Claimant contends that her dismissal (constructive or not) was for an automatically unfair reason – “because she took a period of maternity leave” (new paragraph [35]) under s99 ERA 1996.
23. Again, she had already pleaded those facts and allegations in her maternity discrimination claim. Specifically, she said that she had been subjected to discriminatory treatment “because she took a period of maternity leave”, and that this treatment included “The content of the meeting on 12 November where Rachel effectively forced the Claimant to resign..”.
24. Both the amendments were therefore minor amendments and the time limits did not apply to them. Further, I considered that no new factual enquiry would be required by the amendments.
25. I considered that the balance of hardship and injustice clearly favoured allowing the amendment to bring legal claims on facts which had been pleaded at the outset. It would be very unfair to the Claimant to prevent her from bringing claims which might be the correct legal interpretation of the facts which she had originally pleaded. The amendment application had been made at an early stage of the proceedings and there could be little or no prejudice to the Respondent when no substantive steps had been taken for preparation for the final hearing.
26. I made clear that my decision was based on the Claimant’s assertion that her s99 automatic unfair dismissal claim relied on the same allegations as in her original maternity discrimination claim, set out in renumbered paragraph [36] of the amended claim.

Particulars

27. At the hearing on 20 May 2020 EJ Galbraith Martin had recorded: “The Respondent seeks clarification on the wording of paragraph 31 of the Particulars of Claim. In particular, the specific events, by reference to date, relied upon by the Claimant in support of her Unfair (Constructive) Dismissal complaint. The Claimant agreed to provide further and better particulars by **10 June 2022**.”
28. On 13 June 2022 the Claimant had provided what she described as further particulars. However, I agreed with the Respondent that these included new allegations and did not provide the dates and specific events relied on in her original claim. They were not the particulars envisaged by EJ Galbraith Martin. I agreed with the Respondent that the Respondent was likely to be unable to provide relevant disclosure and witness evidence to answer the generalized allegations in the original claim.
29. The Respondent had written to the Claimant on a number of occasions seeking the further particulars it required. I gave Miss Gumbs time during the hearing today to take instructions. I said that it was important to have clarity and finality in the pleadings, so that the parties would be on an equal footing and they could prepare for a hearing which would be fair to both.

30. Miss Gumbs provided additional particulars, having taken instructions. Miss Stanley agreed that most were helpful, but asked that some were further refined. The following was agreed as a way forward:
31. The text of paragraph 1(b)(vi) of the Claimant's particulars dated 7 October 2022 is agreed as follows: "During the Claimant's maternity leave, a pharmacy sponsored bags project was proposed by the Claimant's maternity leave cover and approved by Antonia. On the Claimant's return from maternity leave Antonia interrogated the Claimant as to where the evidence was that the project would work despite the project being instigated by the Claimant's maternity leave cover and approved by Antonia. Antonia subsequently moved the project from the Claimant's team to her team."
32. If the Respondent seeks further particulars of paragraph 36.g of the amended Grounds of Complaint, it shall send its request for further particulars to the Claimant by 14 October 2022. The Claimant shall reply by 21 October 2022.
33. By 4pm on 11 October 2022 the Respondent shall update the Claimant's 7 October 2022 further particulars to reflect the parties' agreement at the ET and send the agreed document to the tribunal.
34. By 14 October 2022 the Claimant shall provide the information highlighted in yellow in her particulars documents dated 7 October 2022.
35. The parties also agreed changes to the dates already given for disclosure, bundle preparation and exchange of witness statements. These are set out below.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

Further Particulars

1. If the Respondent seeks further particulars of paragraph 36.g of the amended Grounds of Complaint, it shall send its request for further particulars to the Claimant by **14 October 2022**. The Claimant shall reply by **21 October 2022**.
2. **By 4pm on 11 October 2022** the Respondent shall update the Claimant's 7 October 2022 further particulars to reflect the parties' agreement at the ET and send the agreed document to the tribunal.
3. **By 14 October 2022** the Claimant shall provide to the Respondent the information highlighted in yellow in her particulars documents dated 7 October 2022.

Documents

4. **By 18 November 2022** the Claimant and the Respondent must send each other a list and copies of all documents they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. Documents include recordings, emails, text messages, social media, and other electronic information.

Final hearing bundle

5. By **16 December 2022**, the parties must agree which documents are going to be used at the final hearing. The Respondent must paginate and index the documents, put them into a bundle and provide the Claimant with a copy by the same date. This must be by way of an electronic or hard copy depending on the Claimant's preference which, must be communicated to the Respondent in advance. The Claimant and the Respondent should both bring a copy of this bundle to the hearing for their own use.

Witness statements

6. The Claimant and the Respondent will provide full written witness statements containing all the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or **before 20 January 2023**. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission.

Other matters

Public access to employment tribunal decisions

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

You may apply under rule 29 for this Order to be varied, suspended or set aside.

Employment Judge **Brown**
Date: 7 October 2022

SENT to the PARTIES ON

10/10/2022

FOR THE TRIBUNAL OFFICE