Case No: 1803585/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mrs N Taylor**

Respondent: **City of Bradford Metropolitan District Council**

JUDGMENT

Heard at: **Leeds** **On:** **16 November 2022**

Before: **Employment Judge Tegerdine**

Representation
Claimant: In person
Respondent: Miss Bailey (solicitor)

RESERVED JUDGMENT ON APPLICATION TO AMEND

The claimant's application to amend the originating application is partially granted.

REASONS

Background to the application to amend

1. The claimant seeks leave to amend the claim which is currently before the Tribunal, and the respondent largely opposes that application.

2. The originating application was received by the Tribunal on 18 July 2022. The general background and procedural history of the claim as it stands before the determination of this application is set out in the record of the preliminary hearing which took place on 6 October 2022.

3. The claimant confirmed during the hearing that she returned to work on 24 October 2022 after a long period of sick leave. The claimant also confirmed that for the

purposes of her race discrimination claim, she identifies as a British Asian of Muslim origin from Cashmere.

4. At a preliminary hearing on 6 October 2022 the claimant was ordered to provide a list of the detriments she says she was subjected to because she had made protected disclosures. The claimant sent a table of the detriments she seeks to rely on to the Tribunal on 2 November 2022 (the "Table"). *A copy of the Table is appended to this judgment for reference purposes.* The respondent objected to many of the matters which are included in the Table on the basis that they are new matters which were not referred to in the originating application. The claimant's email of 2 November 2022 and the attached Table were therefore treated as an application to amend the originating application. The claimant's amendment application was considered at the hearing.

5. During the preliminary hearing the Tribunal heard oral submissions from the claimant and the respondent's solicitor.

The applicable law

6. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of **Chapman v Simon [1994] IRLR 124**). If a case is not before the Tribunal, it needs to be amended to be added.

7. In **Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC** Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases, re-stated by the EAT in **Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT**, and this approach was endorsed by the Court of Appeal in **Ali v Office of National Statistics [2005] IRLR 201 CA**.

8. In **Transport and General Workers' Union v Safeway Stores Limited EAT 0092/07**, Underhill P as he then was overturned a Tribunal's refusal to allow an amendment because there was no attempt to apply the **Cocking** test, and, specifically, no review of all the circumstances including the relative balance of injustice.

9. The EAT in **Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT** held that in determining whether to grant an application to amend, the Tribunal must always 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. Mummery J as he then was explained that relevant factors would include:

   (1) The nature of the proposed amendment: applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations, and the addition or substitution of other labels for facts already pleaded, to 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; and

(2) The applicability of time limits: if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended; and

(3) 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 may be made at any stage of the proceedings. Delay in making the application is, however, a relevant 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 documents disclosed on discovery.

(4) These factors are not exhaustive and there may be additional factors to consider, including the merits of the claim.

10. The more detailed position with regard to each of these elements is as follows, dealing with each of them in turn:

(1) The nature of the proposed amendment

11. A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting to raise a new distinct head of complaint; (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 (often called "re-labelling"); and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

12. Mummery J in **Selkent** suggests that this aspect should be considered first (before any time limitation issues are brought into the equation) because it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from "re-labelling" the existing claim. If it is a pure re-labelling exercise, it does not matter whether the amendment is brought within the timeframe for that particular claim or not – see **Foxtons Ltd v Ruwiel UKEAT/0056/08**. Nevertheless, whatever type of amendment is proposed the core test is the same: namely reviewing all the circumstances including the relative balance of injustice in deciding whether or not to allow the amendment (that is the **Cocking** test as re-stated in **Selkent**).

13. The fact that there is a new cause of action does not of itself weigh heavily against amendment. The Court of Appeal stressed in **Abercrombie and ors v Aga Rangemaster Ltd 2013 IRLR 953 CA** that Tribunals should, when considering applications to amend that arguably raise new causes of action, focus "not on 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".

14. Any mislabelling of the relief sought is not usually fatal to a claim. Where the effect of the proposed amendment is simply to put a different legal label on facts that are already pleaded, permission will normally be granted.

(2) The applicability of time limits

15. This factor only applies where the proposed amendment raises what effectively is a brand new cause of action (whether or not it arises out of the same facts as the original claim). Where the amendment is simply changing the basis of, or "re-labelling", the existing claim, it raises no question of time limitation (see for example **Foxtons Ltd v Ruwiel UKEAT/0056/08** per Elias P at para 13).

16. The guidance given by Mummery J in **Selkent** and his use of the word "essential" should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered. The judgments in both **Transport and General Workers' Union v Safeway Stores Limited UKEAT 009207** and **Abercrombie v AGA Rangemaster Limited [2014] ICR 209 CA** emphasised that the discretion to permit amendment was not constrained necessarily by limitation.

17. See also **Reuters Ltd v Cole UKEAT/0258/17/BA** at para 31 per HHJ Soole: "In this respect a potential issue arises from the conflict in EAT authorities as to whether the Tribunal must definitively determine the time point when deciding on the application to amend (**Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge and Others UKEATS/0007/16 (12 August 2016)**) or whether the applicant need only demonstrate a prima facie case that the primary time limit (alternatively the just and equitable ground) is satisfied (**Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN (22 November 2017)**). In the light of the exhaustive analysis of the authorities undertaken by His Honour Judge Hand QC in **Galilee**, I would follow the latter approach."

(3) The timing and manner of the application

18. This effectively concerns the extent to which the claimant has delayed making the application to amend. Delay may count against the claimant because the overriding objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment - see **Martin v Microgen Wealth Management Systems Ltd EAT 0505/06**. However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings.

19. The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in **Ladbrokes Racing Ltd v Traynor EATS 0067/06**. The Tribunal will need to consider: (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and (iii) whether delay may have put the

other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

(4) The merits of the claim

20. It may be appropriate to consider whether the claim, as amended, has reasonable prospects of success. In **Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06**, one of the reasons the EAT gave for upholding the Tribunal's decision to refuse the application to amend was that it would have required further factual matters to be investigated "if this new and implausible case was to get off the ground". However, Tribunals should proceed with caution, because it may not be clear from the pleadings what the merits of the new claim are. The EAT observed in **Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12** that there is no point in allowing an amendment to add an utterly hopeless case, but otherwise it should be assumed that the case is arguable.

21. Langstaff P made the following observations in **Chandhok v Turkey [2015] IRLR 195 EAT** from paragraph 16: "The claim, as set out in the ET1, is not something to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning … the claim as set out in the ET1. [17] … If a claim or a case is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendment; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in light of the identification resolving, the central issues in dispute. [18] In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverting into thinking that the essential case is to be found elsewhere than in the pleadings."

Conclusions

22. Applying these legal principles above to the current application, the Tribunal has reached the following conclusions.

Amendments the respondent does not object to

23. The respondent accepts that the matters which are set out at points 8, 11, 24, 33, 37, 40, 42, 45, 47, 48, 49, 50, 52, 53, 54, 55, 56 of the Table are related to matters which are referred to in the originating application. The respondent does not object to the claimant's application to amend her claim to include these matters.

24. During the hearing the claimant provided the following clarification about the points referred to at paragraph 23:

24.1 The complaint at paragraph 8 of the Table is that the business team didn't invite the claimant to a meeting in February 2021.
24.2 The complaint at paragraph 24 of the Table is about Jason Scothern's behaviour.
24.3 The complaints referred to at paragraphs 47, 49 and 56 of the Table relate to the following issues. The claimant says that from 17 January 2022 the respondent's IT system was running slow and she was unable to log in. The claimant's access to the respondent's IT systems was partially blocked at this time because the system wasn't working properly and she wasn't able to access things. The claimant says that from 8 February 2022 her access was completely blocked, as her computer would switch on, but her log in details were rejected, and she received messages saying that the Administrator had blocked her access. The claimant says she hasn't been able to book annual leave, as her access to her emails has been blocked.

25. As the matters referred to at points 8, 11, 24, 33, 37, 40, 42, 45, 47, 48, 49, 50, 52, 53, 54, 55, 56 of the Table arise out of the same facts as the existing claim, and the respondent does not object to the claimant's application to amend the originating application in these respects, the claimant's amendment application in respect of these matters is permitted.

Amendments which relate to matters raised in the existing claim

26. The respondent objected to the claimant's application to amend the originating application to include the matters at point 51 of the Table on the basis that these matters had not been raised in the originating application. However, the Tribunal is satisfied that these matters are directly linked to, or arise out of the same facts as, the existing claim, and do not alter the basis of the existing claim, as they relate to the claimant's grievance being delayed and rejected, which is referred to at paragraphs 5 and 21(iv) of the Particulars of Claim.

27. As the matters at point 51 of the Table are directly linked to, or arise out, of the existing claim, and do not substantially alter the basis of the existing claim, the balance of injustice weights in favour of the claimant. The claimant's application to amend the originating application to include those matters is permitted on that basis.

Amendments which would have been presented in time if they had been presented as a fresh claim

28. During the hearing the claimant provided the following clarification about the matters referred to at point 57 of the Table:

28.1 The claimant says that she was suddenly bombarded by calls and texts, and felt that she was being forced to attend counselling sessions urgently. The claimant says that this was stressful for her, and that the urgency seemed to be related to her Tribunal claim. The claimant says that she received calls and text messages on 16 August 2022 and the following few days.

29. In respect of the claimant's application to amend the originating application to include the matters at point 57 of the Table, the Tribunal finds that the claimant's application to amend the originating application in respect of that matter was made promptly, and that there is a prima facie case that if this claim had been presented as a fresh claim, it would have been presented in time.

30. Although these matters are not directly linked to the existing claim, the Tribunal finds that the balance of injustice weighs in favour of the claimant, because the claimant has established a prima facie case that this claim would have been presented in time if it had been presented as a fresh claim. The claimant's application to amend the originating application to include the matters at point 57 of the Table is permitted on that basis.

Amendments which would not have been presented in time if they had been presented as a fresh claim

31. In respect of the claimant's application to amend the originating application to include the matters at points 1, 2, 3, 4 (incorrectly labelled 5 in the Table), 5, 6, 7, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 38, 39, 44 and 46 of the Table, the claimant seeks to introduce new matters and arguments which were not raised in the originating application, and were not raised thereafter until they were sent to the Tribunal in the Table on 2 November 2022. These alleged acts appear to occurred more than three months before they were raised by the claimant on 2 November 2022.

32. The claimant had the benefit of legal advice at various stages before and after the originating application was lodged. The claimant has not provided a satisfactory explanation as to why the fresh matters which are included in the Table could not have been put before the Tribunal in the originating application.

33. The claimant says she has been suffering from stress, hyper-thyroidism, asthma and carpal tunnel syndrome, and has been taking pain medication and sleeping tablets, and that these issues prevented her from including the matters referred to at paragraph 31 in the originating application. However, the claimant was able to participate in an internal grievance process and prepare and submit the originating application on 18 July 2022, and there was no evidence that the claimant's health issues affected her ability to include the matters which are set out at paragraph 31 in the originating application. The claimant also says that she was waiting for the outcome of the respondent's internal investigation, however as the claimant submitted her originating application on 18 July 2022, the claimant could and should have included all relevant matters in the originating application.

34. The claimant says that she did not include the matters set out at paragraph 31 in her originating application because she "was scared to name names", however the claimant did not give any reason as to why she felt scared, and the Tribunal finds that

any apprehension the claimant may have felt about providing clear and detailed information about her claim was not a good enough reason to omit relevant matters from the originating application.

35. The Tribunal is not satisfied that the claimant has established a prima facie case that these claims were brought in time, or that it would be just and equitable to extend time for bringing these claims.

36. In respect of the possibility that the new allegations could form part of conduct extending over a period, there appears to be no common thread between the numerous additional allegations which have been raised. Various different individuals are said to have committed detrimental acts, most of which appear to be unrelated to each other. The claimant has not provided any explanation as to how the various alleged acts could be linked to each other.

37. The claimant's delay in raising the matters set out at paragraph 31 would cause prejudice to the respondent if the claimant was permitted to amend the originating application to include these matters, because a number of the respondent's employees who would have been able to give evidence in respect of those matters are no longer employed by the respondent, and some of the respondent's potential witnesses were agency workers who no longer work for the respondent. Some of the these individuals have had their email accounts closed down. For these reasons it may no longer be possible for the respondent to retrieve relevant emails, and it may be difficult for the respondent to track down and persuade ex-employees and former agency workers to give evidence on its behalf.

38. The Tribunal has regard to the overriding objective to deal with matters proportionately, and the public interest of the finality of litigation. The interests of justice apply to both parties, and it would be unjust to permit the claimant to advance arguments which could have been set out in the originating application.

39. The Tribunal finds that it is not proportionate to allow the claimant to greatly expand the complaint in circumstances where the claimant is seeking to add numerous matters to her claim which are not related to the matters which set out in the originating application. Disproportionate time and resource would be expended if the scope of the claimant's complaint was permitted to include these matters, and this would be unjust to the respondent, and in breach of the Tribunal's obligation to apply the overriding objective and keep matters proportionate.

40. For the reasons set out at paragraphs 31 to 39 the claimant's application to amend the originating application to include the matters at points 1, 2, 3, 4 (incorrectly labelled 5 in the Table), 5, 6, 7, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 38, 39, 44 and 46 of the Table is refused.

Amendments to include impermissible matters

41. The amendment at paragraph 41 of the Table relates to the respondent's participation in the Acas early conciliation process. These matters cannot form part of the claimant's claim, as any discussions via Acas cannot be referred to in legal proceedings. The claimant's application to amend the originating application to include the matters at point 41 is therefore refused.

Amendments in respect of which further information is required

42. In respect of the matters at points 9 and 43 of the Table, the claimant seeks to bring an entirely new complaint of a failure to make reasonable adjustments in respect of dyslexia, which the claimant says amounts to a disability for the purposes of the Equality Act 2010. The Tribunal is currently unable to determine the claimant's application to amend the originating application in respect of these matters, as the claimant has not provided enough information to enable the Tribunal to make a determination. The claimant's application to amend her claim to include a complaint of a failure to make reasonable adjustments will therefore be considered at a further preliminary hearing.

Employment Judge Tegerdine

Date 23 December 2022

RESERVED JUDGMENT AND WRITTEN REASONS SENT TO THE PARTIES ON
9 January 2023
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FOR EMPLOYMENT TRIBUNALS