EMPLOYMENT TRIBUNALS

Claimant: Mrs T Ellis

Respondent: Robert Jones and Agnes Hunt Orthopaedic Hospital NHS Foundation Trust

Heard at: **Midlands West** **On:** **17 October to 1 November and 12 to 14 December 2022**

Before: Employment Judge Woffenden
Members: Mr K Hutchinson
Ms M Stewart

Representation
Claimant: In Person
Respondent: Ms S Bowen of Counsel

Written reasons for the tribunal's decision to refuse the claimant leave to amend her claim having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, reasons are provided below:

REASONS

Introduction

1 The claimant's claim was presented to the tribunal on 7 May 2019 .

2 The hearing of the claimant's claim began on 17 October 2022 and continued until 1 November 2022 when it was adjourned until 12 to 14 December 2022. The claimant first raised the issue of a potential amendment during the final stage of the hearing which began on 17 October 2022 . The tribunal gave the claimant until 3 November 2022 to make any such application . During the period of adjournment the claimant made an application to amend her claim dated 3 November 2022 to add another allegation of direct disability discrimination

namely that Gina Huxley/Mr Timmins failed to send her internal vacancy bulletins on a weekly basis from 2 May 2019 to 15 July 2019 [only receiving one such bulletin from Ms Huxley on 5th June 2019]. She complied with Rule 30 (2) Employment Tribunal Rules 2013 (as amended).The respondent objected to that application in its letter to the tribunal dated 3 December 2022.

3 The application was determined when the hearing resumed on 12 December 2022 and was refused. The claimant asked that reasons in writing be provided.

The Law

4 Under its general power to regulate its own proceedings and specific case management powers, an Employment Tribunal can consider an application to amend a claim at any stage of the proceedings.

5 The principles in relation to the grant or refusal of an amendment are set out in the case of **Selkent Bus Co Ltd v Moore [1996] ICR 836**. In **Selkent,** the EAT confirmed that the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. What are the relevant circumstances? Whilst it was impossible and undesirable to attempt to list them exhaustively, the EAT considered that the following are relevant:
(a) The nature of the amendment – this can cover a variety of matters such as:
i. the correction of clerical and typing errors;
ii. the additions of factual details to existing allegations;
iii. the addition or substitution of other labels for facts already pleaded;
iv. the making of entirely new factual allegations which change the basis of the existing claim.
(b) 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 ET to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.
(c) The timing and manner of the application - it is relevant to consider why the application was not made earlier and why it is now being made: e.g. the discovery of new facts or new information appearing from documents disclosed on discovery.

6 The tribunal reminded itself the claim ,as set out in the claim form is '*not just something to get 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 on their say so'* (Langstaff P in **Chandhok v Tirkey UKEAT/0190/14/KN**).

7 If a complaint under the Regulations is out of time, tribunals have the power to extend time where they consider it would be just and equitable to do so (Regulation 18 (5)). It is for a claimant to persuade a tribunal to exercise its discretion in their favour.

8 In **Vaughan v Modality Partnership [2021] IRLR 97, EAT**, HHJ Tayler reminded tribunals that the core test in considering applications to amend is the exercise, described as fundamental, of balancing injustice and hardship in allowing or refusing the application. Although the employment judge may need to take a more inquisitorial approach when dealing with litigants in person, the

exercise starts with the parties making submissions on the specific practical consequence of allowing or refusing the amendment. If they fail to do so it will be much more difficult for them to criticise the employment judge for failing to conduct the balancing exercise properly. The **Selkent** factors should not be treated as a list to be checked off. The parties should not lose sight of the necessary balancing exercise.

Claimant's submissions

8 In her application the claimant reminded us she was a litigant in person and dyslexic and said significant parts of her claim were omitted from the agreed list of issues. She had not realised that the allegation she now wanted to add was not in the agreed list of issues until cross-examination .She had found the agreed list of issues a difficult document to understand.

9 In her oral submissions to the tribunal the claimant said she had struggled with the agreed list of issues and after the hearing had gone home and looked at it more closely and undertaken a search of her lap top in relation to vacancy lists. She accepted that the additional allegation was not in her claim form. She said it had been drafted by her legal representatives. She also accepted that there had been a previous (successful) amendment application .She had appeared at the first preliminary hearing on her own (14 January 2020 before Employment Judge Dimbylow) but then at the suggestion of the Employment Judge had obtained legal advice and those representatives had prepared the list of issues for her. She did not attend the second preliminary hearing though she was represented at it. She had not been asked about the list of issues.

10 I asked her if she could explain to me why the amendment was important to her. She said that had she had the vacancy bulletins she could have scrutinised them and applied. She then said that it had been agreed between the parties that she would not get the vacancies list during the time she was working as a trainee clinical coder but that this had never been reinstated .She said she was on her own and dyslexic and her thinking went 'AWOL' in understanding things. The agreed list of issues was quite a big document and she had never done an employment tribunal claim before. She said the provision of vacancy lists was a provision in the respondent's sickness absence policy.(We note here that that is not in fact a provision in the policy in question).

Respondent's submissions

11 Ms Bowen submitted that the additional allegation was not in the claim form or in the earlier amendment application.It seemed unlikely for the claimant's representatives to have submitted a list of issues without her instructions. She said one of the relevant **Selkent** factors in deciding whether or not to grant an application was time limits. She described the delay of 3 ½ years that had elapsed since the alleged events in question as 'colossal'. The claims and issues had been discussed and recorded by Employment Judge Dimbylow on 14 January 2020 in particular the direct disability discrimination claim was set out and only 2 allegations were recorded. The claimant had then instructed a firm of solicitors which applied to amend her claim in February 2020 and leave was granted (29 July 2020). Nothing of the nature of the additional allegation was included. It had been the claimant's case that she had been provided with vacancy lists which accorded with the respondent's amended grounds of

resistance. The names of the individuals now referred to were did not feature in the pleadings. At the second preliminary hearing before Employment Judge Broughton when the claimant was represented by Counsel there was no indication that this was an allegation in the proceedings. The list of issues (which set out the factual allegations relied on was subsequently agreed with the claimant's solicitors (18 September 2020) . She said the claim had been reconstructed over a 12 month period. The subject matter of the new allegation had never been raised at the time depriving the respondent of the opportunity to secure and retain evidence. The tribunal should also have regard to the prospects of success. Even if the vacancy lists in question were not sent to her on what basis could an inference be drawn that this had anything to do with her disabilities? Further it was not mentioned in the claimant's witness statement and brought up for the first time after the claimant's case had concluded. There should be no just and equitable extension ; notwithstanding her dyslexia the claimant has managed to put in a very detailed list of issues(16 pages). Further the balance of injustice fell on the respondent. The time factor was not a barrier but should weigh very heavily against granting the extension. She also cast some doubt on whether the allegation fell within the definition of 'matter' for the purposes of the ACAS certificate.

12 The respondent's written objections set out its additional submission on prejudice. It was submitted that the respondent would be at a greater prejudice if the amendment were made as it would need to call potentially an additional two witnesses to give evidence in support of the defence to the claim. This would involve further time and costs of preparing witness statements and preparation and attendance at the hearing. The respondent was a public sector organisation with limited means and had already incurred significant fees in defending the claim all the way at a hearing. It did not consider that the claimant would suffer significant hardship if her amendment application was refused as she was still able to pursue her existing substantial claims. It also set out its evidential difficulties in relation to email retrieval so long after the events in question.

Conclusions

13 The proposed amendment is of a new factual allegation which is not contained in the claim form nor did it feature in the subsequent detailed amendment application which was made at a time when the claimant was legally represented and (we presume) able to give instructions on its subject matter even if she was not subsequently asked about the agreed list of issues which followed. The new allegation is a complaint of direct disability discrimination, two complaints of which are already before the tribunal as recorded in the agreed list of issues.

14 As far as time limits are concerned there is no question that the new proposed complaint is very substantially out of time. This is a factor which tribunals can take into account but is not necessarily conclusive (**Vaughan**) . We do think that the time factor here does weigh heavily against the granting of the application. As far as an extension on just and equitable grounds is concerned we are not persuaded that not having understood what was in one's own case is a ground for an extension. The claimant has had legal representatives. The job of a legal representative is to put a party's case together on the basis of instructions. We have no reason to think that is not exactly what the claimant's representatives did and ultimately resulted in a long and detailed agreed list of issues. If that

document did not reflect her instructions then that is a matter for her to take up with them .

15 This application was made very late after 10 days of hearing. We are not persuaded that it was not until cross-examination that the claimant realised this particular allegation was not in the agreed list of issues. The agreed list of issues is we accept a very lengthy document and not easy to read but the factual allegation on which the claimant now wants to rely is very simple and straightforward and in our judgment its absence from the short section setting out her direct disability discrimination claim should have readily apparent to her on looking at the document again as she must have done sometime after 18 September 2020. On what she has said to us today the facts she wants to rely on seem to differ from that in her application because she seemed to be saying that what she was complaining about was the respondent's failure after an agreed hiatus to reinstate the sending to her of vacancy lists.

16 As far prejudice is concerned there is obviously some prejudice to the claimant if she is not permitted to add this allegation but as HHJ Tayler said in **Vaughan** the question is not that the claimant does not get what they want -the real question is will they be prevented from getting what they need .This requires an explanation of why the amendment is of practical importance to the claimant. In this case the explanation given by the claimant did not help us. It seemed to be about what would have happened if she had had the vacancies list .Of course she has all the other allegations already before the tribunal including of direct discrimination. We are not convinced this addition would make much difference. As far as the respondent is concerned we accept what is said about prejudice in paragraph 12 above to which we add the likely further substantial delay in concluding a long outstanding matter. We have also taken into account though not given it much weight that there does not appear to be anything which indicates that the claimant will be able to discharge the initial burden of proof on her to show some commission in question was because of disability to this new allegation.

17 Taking all of the above into account the application is refused.

Employment Judge Woffenden

Date 10th March 2023