



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Katy Evans

**Respondents:** (1) University Hospitals of Derby and Burton NHS Foundation Trust  
(2) Mrs Karen Clarke

**On:** 15 and 16 March 2023

**Before:** Employment Judge Ahmed (sitting alone)

**At:** Leicester (via CVP)

## Representation

**Claimant:** In person  
**Respondent 1:** Mr Charles Crow of counsel  
**Respondent 2:** In person

## JUDGMENT AT A PRELIMINARY HEARING

The decision of the Tribunal is that:

1. The Claimant's application to amend her claim to include a complaint of disability discrimination is refused.
2. The Claimant's application to amend her claim to include a complaint of victimisation is refused.
3. The Claimant's complaint of detriment by reason of having made a protected disclosure has no reasonable prospect of success and is struck out.
4. The complaint of breach of contract is dismissed upon withdrawal.

## REASONS

1. This was a Preliminary Hearing to determine:
  - 1.1 The Claimant's application to add complaints of disability discrimination, in particular complaints of a failure to make reasonable adjustments and discrimination arising from disability;

- 1.2 If the amendment application above is granted whether the Claimant was a disabled person by reason of mood disturbance and anxiety;
- 1.3 The Claimant's application to amend her claim to bring a complaint of victimisation;
- 1.4 To amend the claim to add a complaint of victimisation
- 1.5 The Respondent's application to strike out the existing complaint of whistleblowing.
2. The Claimant has been employed by the Respondent since 15 October 2018 as an Inflammatory Bowel Clinical Nurse. She continues to be employed by them. She has throughout been a litigant in person.
3. On 23 July 2022 she presented a claim to the Tribunal having undergone ACAS early conciliation from 26 June 2022. Within her Claim Form she sought to bring a number of claims which fall outside the ambit of Employment Tribunals such as breach of GDPR, slander/libel and bullying and harassment unconnected to a protected characteristic. She also sought to bring a complaint of breach of contract but as she still employed by the Respondent the Tribunal has no jurisdiction to entertain this.
4. The only complaints over which the Tribunal could have jurisdiction and which were being advanced were (1) detriment by reason of having made a protected disclosure (whistleblowing) and (2) harassment in relation to disability by perception on the principles set out in **English v Sanderson Blinds Ltd** (2008) EWCA Civ 1421. The Claimant does not of course need to be a disabled person to have the protection of the latter. The case is listed for a full-merits hearing for 3 days on 17 – 19 July 2023.
5. On or around 12 November 2022 the Claimant indicated a desire to add complaints of disability discrimination.
6. At a case management hearing on 15 November 2022 Employment Judge Britton considered the matter in some detail. In view of the lack of particularity as to the proposed amendment application he directed the Claimant to set out her application in writing. He listed the matter for an Open Preliminary Hearing if the amendment issue remained contested. He also directed that the Preliminary Hearing would deal with any other applications the Respondent might make. Upon the application of the Claimant he joined Ms Karen Clarke as a Second Respondent. Ms Clarke represents herself in these proceedings.
7. On 15 December 2022 the Claimant made her application to amend to include complaints of disability discrimination and to add victimisation. Whilst it is lacking in detail it is at least tolerably clear that the Claimant is seeking to add complaints of discrimination arising from disability and a failure to make reasonable adjustment.
8. Following that hearing the First Respondent wrote to the Tribunal to resist the amendment application and applied for the whistleblowing complaint to be struck out. There is no application to strike out the harassment complaint by

either Respondent.

9. In her application to amend the Claimant refers to a number of events throughout her employment which she says have impacted on her mental health but does not set out any provision, criterion or practice, the substantial disadvantage caused by it and what reasonable adjustments ought to have been made to remove the disadvantage. The alleged acts of unfavourable treatment arising from disability are also unclear.

10. In coming to my decision on the amendment application I take into consideration the guidance in **Selkent Bus Company v Moore** [1996] IRLR which is as follows:

“In deciding whether to exercise its discretion to grant leave for amendment of an originating application a 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. Relevant circumstances include:

- (a) The nature of the amendment, ie whether the amendment sought is a minor matter such as the correction of clerical and typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels for facts already pleaded to, or, on the other hand, whether it is a substantial alteration making entirely new factual allegations which change the basis of the existing claim.
- (b) The applicability of statutory 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 under the applicable statutory provisions.
- (c) The timing and manner of the application. Although the tribunal rules do not lay down any time limit for the making of amendments, and an application should not be refused solely because there has been a delay in making it, it is relevant to consider why the application was not made earlier. An application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then and not earlier, particularly where the new facts alleged must have been within the knowledge of the applicant at the time the originating application was presented.”

11. In addition I have also taken into consideration the guidance given in the recent case of **Chaudhrey v Cereberus Security and Monitoring Services Ltd** 92022) EAT 172. That case emphasised the importance of firstly identifying the amendment sought and then secondly considering the balance of hardship test set out in **Selkent**.

12. This is clearly not a re-labelling exercise. The application seeks to raise a new cause or causes of action. The application is made late with no satisfactory explanation for the delay. The Claimant is a litigant in person but access to information about legal rights is now much more readily available through the internet or a quick telephone call to ACAS. The ambit or the allegations is still not clear and whilst that could ordinarily be remedied by an order for further information it seems to me unlikely this would be easily achieved given that the Claimant has already been given guidance at a telephone preliminary by Employment Judge Britton.

13. The most significant factor is however the prejudice that would be caused if the amendment was to be allowed. The case is already set down for a full-merits hearing in four months' time and to allow the amendment would almost certainly result in that hearing having to be vacated. That will cause significant prejudice to the

Respondent who are not at fault for this late application and who are otherwise ready for the hearing. The balance of hardship therefore clearly favours the Respondent. It may have been less of a concern if the Claimant had clearly identified what the allegations were and no further work was required but that is not the case. For those reasons the application for an amendment is refused. As such there is no need to consider whether the Claimant is a disabled person.

14. The application to add victimisation is refused for the following reasons:

14.1 The Claimant has failed to identify any pleaded protected act;

14.2 To allow the Claimant time to do so would raise the same problems as to adjourning the hearing as set out above;

14.3 There is no specified detriment by reference to any potential protected act/

#### Strike out application on the whistleblowing complaint

15. I am conscious that whistleblowing complaints are similar to discrimination claims in many respects and there is a line of authorities against striking out discrimination claims.

16. In this case however I consider it appropriate to strike out the detriment complaint for the following reasons:

16.1 The Claimant has failed to set out her allegations with any or any adequate particularity. She was asked by the Respondent a number of questions in written form and asked to complete a box (or table) which would have ensured the relevant information was before the Tribunal. The Claimant failed to do so. Instead she set out a narrative which failed to provide the necessary information on essential matters such as the relevant provisions relied on for the purposes of section 43B Employment Rights Act 1996.

16.2 The Claimant has failed to identify any potential disclosure of information. She says she expressed concerns about low staffing and its effect on patient safety but that is an almost everyday topic of conversation in the NHS, not a disclosure of specific information.

16.3 The Claimant has failed to identify any potential detriment. She vaguely refers to an attempt to block her return to the IBD team but does not identify any date and there is nothing to support her allegation other than her own perception. She also relies on potential detriment following a meeting with Mr Bolton in April 2020 but there is nothing that Mr Bolton did which could potentially have amounted to detriment. In any event it would be out of time. The Claimant gave oral evidence today but failed to establish why it was not reasonably practicable to make an application in time.

17. For those reasons the complaint of detriment for having made a protected disclosure is struck out.

18. The Claimant has withdrawn her complaint of breach of contract recognising the Tribunal has no jurisdiction. I shall therefore formally dismiss it upon withdrawal.

19. Case management orders for the issues which are to proceed to a final hearing are set out separately.

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Employment Judge Ahmed

Date: 3 April 2023

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