



EMPLOYMENT TRIBUNALS

PRELIMINARY HEARING

Claimant Ms R Hannan

Represented by Ms L Barroso, Trades Union Representative

Respondent The Royal Society for the Encouragement of Arts, Manufactures and Commerce

Represented by Ms A Fadipe of Counsel

Employment Judge Ms A Stewart (sitting alone)

Held at: London Central by CVP **on:** 29 March 2023

JUDGEMENT

1 The Claimant's application to amend her Claim Form so as to insert a new paragraph 27 as follows: "In the alternative, if the Tribunal finds her not to have been dismissed, the Claimant submits that the curtailment of her notice period, with a payment in lieu, was a detriment for taking part in the activities of an independent trade union at an appropriate time, or penalising her for doing so, pursuant to section 146(1)(b) of TULR(C)A 1992", is granted.

ORDERS

1 The Claimant will provide a Schedule of Remedy and Loss, setting out what she seeks, both financially and otherwise, to the Respondent and copied to the Tribunal, by 12 April 2023.

2 By 26 April 2023, the Respondent will inform the Tribunal and the Claimant whether or not it seeks a one day open Preliminary Hearing for the purpose of hearing an application to strike out the Claimant's

complaints on the grounds that they, or any of them, have no reasonable prospect of success.

3 By 30 May 2023, the Respondent will co-ordinate a finalised, agreed List of Issues, and provide it to the Claimant and to the Tribunal.

4 A Full Merits Hearing of this case, to include remedy, will take place over 3 days, from 10 to 12 October 2023 inclusive, before a Judge sitting alone.

4 Case management steps to that end will be as follows:

(i) Disclosure of all documents relevant to the issues in dispute, will take place, by list and copy, on 11 July 2023.

(ii) The Respondent will prepare an agreed Bundle of documents, in chronological order, indexed and paginated, for use at the hearing and provide a copy to the Claimant by 15 August 2023. The Bundle will be supplied by email to the Tribunal's Bundles Inbox at least 5 days before the start date of the Hearing.

(iii) Each person giving evidence, including the Claimant, must provide a witness statement containing all of the evidence which they wish the Tribunal to hear. It must be set out in chronological order, double spaced, in short numbered paragraphs, and be dated and signed. Any documents referred to in the statement must give their page numbers in the agreed Bundle of documents.

(iv) Simultaneous exchange of Witness statements between the parties will take place on 12 September 2023. Copies of all Witness Statements must be supplied to the Tribunal at least 5 days before the start date of the hearing.

REASONS

Introduction:

1 The Claimant in her Claim Form brought a sole complaint of automatic unfair dismissal under **section 152(1)(b) of TURLCA 1992**. The Grounds of Resistance denied that she had been dismissed because she had resigned and had been paid up to the end of her 3 month notice period. Neither she nor the Respondent was legally represented at the time of the initial pleadings.

2 This case arises because the Respondent, by letter dated 10 October 2022, terminated the Claimant's employment with immediate effect, citing an article by her which had appeared in the 'Observer' newspaper on the previous day. Her notice period was due to expire on 18 October 2022.

3 The Respondent contends that it was invoking a contractual PILON clause and that this cannot, as a matter of law, constitute a dismissal. The

Claimant inter alia disputes the contractual nature of the PILON clause, its applicability to herself and its true construction and contends that she was dismissed.

4 The Claimant now seeks to amend her claim so as to include the alternative complaint of having suffered detriment/being penalised by the early termination of her employment before the expiry of the notice period, with immediate effect, within the meaning of **section 146(1)(b) of TURLCA 1992**. She contends that it is a mere relabeling exercise and that all the material facts are in the existing Claim Form.

5 The Respondent strongly opposes the application. It contends that this is a new, and contradictory claim, is out of time, that the Claimant was tardy in making this application and that the balance of prejudice favours the rejection of the application.

6 The following principal cases were cited in argument before the Tribunal: **Selkent Bus Co Ltd v Moore 1996 ICR 836 EAT; Abercrombie v AGA Rangemaster Ltd 2013 IRLR 953 AC; Marshall (Cambridge) Ltd v Hamblin 1994 ICR 362; Vaughan v Modality UKEAT 0147 20BA(V)**. The Tribunal was assisted by thorough argument from the parties' representatives.

Reasoning and Conclusions

7.1 The type of amendment: The amendment sought is not, in the strict sense, the relabeling of an existing claim as something else. Rather, it seeks to add an alternative and parallel claim to the existing one. Both sections **152(1)(b) and 146(1)(b) of TURLCA 1992** relate to taking part in the activities of an independent trade union at an appropriate time. One section is headed 'Dismissal of employee on grounds related to union membership or activities' and the other 'Detriment on grounds related to union membership or activities'.

7.2 All of the facts relied upon in support of the amendment sought are contained in the existing Particulars of Claim. The alleged factual 'detriments' are set out in detail in paragraphs 20 to 24 inclusive of the original particulars of claim. They include such matters as being cut off in the middle of a Teams meeting with a colleague immediately after receipt of the Respondent's letter of 10 October 2022, being suddenly barred from access to the SharePoint and email systems; being unable to fulfil pre-arranged meetings and handover activities or to communicate her non-attendance to others; the shock, distress and upset at the tarnish to her professionalism, career and reputation at leaving tasks incomplete; the need to inform her new employer about the early termination and the anxiety and uncertainty as to whether this might jeopardise her new job; the distress at being unable to take proper leave of colleagues and external contacts and feeling she had let everyone down by not leaving things in the best order at her departure. These allegations are entirely discrete from her allegations of unfair dismissal set out in the ET1. No further factual pleading is required or sought by either party.

8.1 Timing: The ET1 was presented to the Tribunal on 2 February 2023. This amendment application, made on 23 March 2023, was outside the primary time limit. The Claimant received the Grounds of Resistance on 16 March 2023, which stated an intention to seek to strike out the claim.

8.2 Ms Barroso told the Tribunal today that she had found out from Ms Taylor, of the Respondent, at the end of 2022 that the Respondent's view was that there was a PILON clause and therefore that there was no dismissal. However, upon reading the contract the Claimant's team felt that there was no such clause applicable to the Claimant. Then, upon receiving the ET3, Ms Barroso asked the Respondent to clarify the basis on which they sought strike out, since it appears to include a time/jurisdiction point, but she did not receive an answer.

8.3 The Claimant's union representatives are not qualified lawyers, although Ms Barroso's job title is Head of Legal. They obtain pro-bono legal advice as necessary. Upon receipt of the ET3, on 17 March 2023, they obtained Counsel's opinion and were told that the unfair dismissal claim was strong.

8.4 As to the manner of amendment application: the initial application to amend cited a claim under **section 146(1)(b) of TURLCA 1992**, without including the precise text of the amendment sought, as is good practice, and Ms Barroso said that she could have set this out within 2 weeks of receiving the Grounds of Resistance, although the precise text was only provided at today's hearing. However, the citation of the section number in itself would have offered reasonable clarity as to the amendment sought in this case.

9.1 The balance of injustice, hardship and prejudice: The Respondent contends that the existing unfair dismissal claim is misguided and without merit, hence the Respondent's intention to seek to have it struck out, and that the Claimant is trying to replace this with a new claim, out of time, which is also without merit and this is highly prejudicial to the Respondent; that the Claimant needs to show a prima facie case of detriment, but that she suffered no financial loss; that if the amendment is allowed, the Respondent will be required to face a claim which it would not otherwise have had to face and that the balance of injustice lies in favour of the Respondent.

9.2 However, it appears at this stage, that there are, at the very least, conflicting legal contentions between the parties regarding the existing **section 152(1)(b)** complaint. Further, it is clear from multiple case law that 'detriment' is not confined to financial loss. And no amendment would ever be allowed if a Respondent having to face a new head of claim was determinative of the application per se.

9.3 Having regard to the practical implications of the amendment decision in this case: The length and listing dates of the Full Merits Hearing will not be altered if the amendment is allowed; no further pleading is required since the full factual matrix underlying the new complaint is contained within the original Particulars of Claim; no further (or unobtainable) witnesses are required

beyond those already envisaged; the Respondent is not taken by surprise by having to face new factual allegations beyond the contents of the original ET1.

9.4 If the Respondent's assessment of the prejudice to be suffered by the addition of a new claim under **section 146(1)(b)** is predicated upon certainty that the original complaint under **section 152(1)(b)** will be struck out as having no reasonable prospect of success, this is perhaps premature, since it is notoriously difficult to pass that hurdle, save in the most obvious of cases. Indeed, if the original complaint were to be struck out, the prejudice to the Claimant would be particularly severe if the amendment was not permitted, enabling her to bring a detriment complaint set out factually in full in her Claim Form, albeit without the legal label attached, since she would be left without any possibility of remedy.

9.5 Weighing the balance of prejudice in all of the circumstances of this case, the Tribunal concluded that it lay in favour of granting the amendment application.

Case Management Orders:

10 The above case management orders were agreed between the parties and the Tribunal following discussion at today's hearing.

Signed: Employment Judge A Stewart

Date 10 April 2023

Judgment sent to the parties on

11/04/2023

FOR THE TRIBUNAL OFFICE

NOTES

- (1) Any person who without reasonable excuse fails to comply with this Order shall be liable on summary conviction to a fine of £1,000.
- (2) Further, if this Order is not complied with, the Tribunal, may (a) make an Order for costs or preparation time against the defaulting party under Rule 76(1) or (2), or (b) strike out the whole or part of the claim, or, as the case may be, the response, and, where appropriate, direct that the Respondent be debarred from responding to the claim altogether.
- (3) You may make an application, upon notice to the other parties, for this Order to be varied or revoked.

