EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000029/2022

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Held in Glasgow on 20 July 2023 [via Written Submissions]

Employment Judge M Kearns

Mrs P McArthur	**Claimant [Assisted by Strathclyde Law Clinic]**
Lidl Great Britain Limited	**Respondent Represented by: Ms O Bell - Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal was that:

20 (1) The claimant's application dated 14 June 2023 to amend the ET1 is allowed.

(2) Within 28 days of the date this note is sent to the parties, the respondent has leave to amend the ET3 in response if so advised.

REASONS

1. The claimant was employed by the respondent from 19 January 2015 until 5 August 2022, originally as a cook/concierge and latterly as a customer assistant. On 5 August 2022, the claimant resigned. On 8 August 2022 the claimant notified ACAS of her intention to make a claim in accordance with the early conciliation requirements and on 10 August, ACAS issued an early conciliation certificate. On 16 August 2022 the claimant presented an application to the Employment Tribunal in which she claimed constructive unfair dismissal and disability discrimination.

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2. The respondent presented its ET3 response to the claim on 15 September 2022. The respondent resists all claims. Following disclosure of the claimant's

medical records and an impact statement, the respondent now accepts that the claimant is disabled as defined in the Equality Act 2010 by reason of COPD and Emphysema.

3. The ET3 grounds of resistance lodged by the respondent contained a number of calls for further and better particulars of the claimant's claim. A preliminary hearing took place on 13 October 2022 before EJ Hosie at which he ordered the claimant to provide further and better particulars of her claim. On 2 November 2022, the claimant sent to the respondent - copied to the tribunal - an email with a narrative of alleged discriminatory acts and/or breaches of the implied term of trust and confidence covering the period between 1 November 2020 and 8 July 2022.

4. In an email response dated 23 November 2022, the respondent submitted that the claimant had not complied fully with the tribunal's order dated 13 October for further and better particulars and requested further information and clarification of the claim. The claimant replied by an email on 28 December 2022 containing further narrative detail.

5. By email dated 13 January 2023, the respondent stated that they still required further information and that in particular, the claimant had not set out the course of conduct relied upon for her constructive dismissal claim or the alleged acts complained of for her discrimination claim. A 'table of further and better particulars' with headings in the form of a Scott schedule for completion by the claimant was attached to their email. The claimant attempted to answer the respondent's questions in an email reply of 18 January.

6. A telephone case management preliminary hearing took place on 27 February 2023 at which EJ Ian McPherson ordered the claimant to complete the Scott schedule the respondent had attached to their 13 January email. With assistance from the Law Clinic, the claimant submitted her completed Scott schedule on 12 May 2023. On 25 May, the respondent provided its comments in response to each row of the Scott schedule. A further telephone case management preliminary hearing took place on 2 June 2023. At that hearing, the claimant said that she had been advised by Strathclyde Law Clinic

that an application to amend the claim should be made to ensure all the matters set out in the Scott schedule were part of the claim. A six day final hearing was fixed to begin on 11 September 2023.

7. On 14 June 2023, Strathclyde Law Clinic ("SLC") submitted an application to amend on the claimant's behalf. By email dated 28 June, the respondent confirmed that they opposed the claimant's amendment application. Both parties consented to the claimant's opposed application to amend being determined on the papers without a hearing.

Discussion and Decision

8. Applying the well-known test in Selkent Bus Co Ltd v Moore 1996 ICR 836 EAT ("the Selkent test"), having regard to the interests of justice, I considered the submissions of the parties and the relevant circumstances of the case. I considered the relative injustice and hardship that would be caused to the parties by allowing or refusing the amendment application respectively. The following circumstances are relevant:

The nature of the proposed amendment

(i) With regard to the nature of the claimant's proposed amendments, they do not, in my view change the basis of the claims. The claimant made claims of constructive unfair dismissal and disability discrimination in her ET1. In terms of the heads of discrimination contained in the ET1, claims under sections 13, 15, 20 and 26 of the Equality Act 2010 are discernible: The claimant complained in the ET1 that reasonable adjustments had been agreed with her verbally but that these were not honoured. She stated that colleagues would ask her to do tasks that were covered by adjustments and that her inability to do them resulted in bullying and/or harassment by colleagues and managers. She gave two specific examples of alleged bullying, stating (i) that she had been told she did not fit the footprint of the branch as they needed a "pallet buster"; and (ii) that an area manager had told her: "anybody can say they have an illness". She alleged that her illnesses were played down. She complained of verbal altercations

about her 'retiring soon' and other comments about her abilities. The amendment contains detailed particularisation of these heads of claim. Applying this part of the Selkent test, it appears to me that the proposed amendments add new factual details to the existing claims, but that they do not do so in such a way as to change the basis of those claims. The amendments are not minor. However, neither are they substantial in the sense of pleading entirely new causes of action.

The applicability of time limits

(ii) It does not appear to me that new claims or causes of action are sought to be added in this amendment application. As the respondent says, discrete acts or omissions prior to 9 May 2022 would be prima facie out of time. My understanding of the case set out in the ET1 and particularised in the proposed amendment is that the acts complained of are said to be conduct extending over a period for the purposes of section 123 Equality Act 2010. The last act complained of is said to be the grievance appeal outcome on 3 August 2022. Because the amendment particularises the ET1, the time bar issues it raises are the same as those in the ET1. There will need to be a determination by the Tribunal at the full hearing of whether or not the acts referred to by the claimant amount to 'conduct extending over a period' and if not, whether it would be just and equitable to extend time. That would have been required in any event. Since the time bar point is entirely bound up with the facts of the case, the respondent's time bar arguments will require to be determined at the full hearing. They are at least better focused by the amendment which supplies some missing dates.

The timing and manner of the application

(iii) In support of the claimant's amendment application, Strathclyde Law Clinic ("SLC") noted that the claimant had originally provided further particulars in accordance with a case management order (on 13 October 2022). They stated that she had been asked by the respondent on more than one occasion for more detail, which she

provided. She was then asked by the respondent to complete a Scott schedule and in response to this she was requested by the respondent to amend her claim. In relation to this last point, SLC submitted that the amendment incorporates the list of incidents that the claimant was requested to provide and then the specification of each incident and the legal claim associated with it. With regard to the timing and manner of the application, the claimant's amendment application was made on 14 June 2023. The hearing has been fixed for 11 September 2023. It comes fairly late in the case. However, much of the content has been rehearsed to some extent in the claimant's grievance, grievance appeal and in her repeated attempts to satisfy the respondents as to the particularisation of her case. At the time of presenting her ET1, the claimant did not have the benefit of legal representation or assistance. She now has assistance from the University of Strathclyde Law Clinic. In relation to the application of Selkent, SLC submits on the claimant's behalf that In general, an 'application should not be refused solely because there has been a delay in making it' but it 'is relevant to consider why the application was not made earlier and why it is now being made. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involving in refusing or granting an amendment'. SLC suggest that because statements were taken from witnesses in connection with the claimant's grievance and appeal, the prejudice to the respondent in the amendment application at this stage is reduced.

(iv) In relation to the manner of the application, the respondent makes a distinction between the claimant's comments on the Scott schedule (which they refer to as the 1st proposed amendment) and her amendment application on 14 June. They submit that whilst the Claimant was permitted by the Tribunal to submit an application to amend her Claim for the purpose of seeking to rely on the matters set out in the Scott schedule, the Claimant was not permitted by the Tribunal to submit a further particulars of claim document (which they refer to as the 2nd Proposed Amendments Document). The

respondent objects to the Claimant seeking to rely on the 2nd proposed amendment document. I reviewed the Preliminary Hearing Note of 2 June in this regard. However, I did not consider that the Note was prescriptive about the manner in which the amendment application should be made.

Other considerations regarding the balance of injustice and hardship

(v) The respondent submits that based on the claimant's claims as pled in the original ET1 Claim, they would need to call three to four witnesses to the Final Hearing. However, should the Claimant's claim as set out in the 1st proposed amendment document be permitted to proceed, then they anticipate that they will need to call nine witnesses. This will therefore incur a substantial amount of additional time and expense for the respondent to prepare for the Final Hearing. I do accept this as part of the injustice and hardship to the respondent. It is possibly cold comfort to the respondent but at least the possible calling of nine witnesses was anticipated at the time of fixing the hearing so that the six-day hearing that has been fixed can accommodate the particularized case.

Which amendment?

(vi) I understand the respondent's concern regarding the submission of a new paper apart to the ET1 on 14 June 2023 which not only incorporates the original ET1 and the contents of the Scott schedule, but also includes additional legal argument about how the law applies to the facts. I understand that this creates additional work for the respondent's solicitors and that it will add to the expense. However, my understanding is that SLC are providing assistance but not representation to the claimant and in these circumstances, on balance I think it is in line with the Selkent principles and the over-riding objective for the claimant's case to be properly set out so that proper notice is given of the claimant's case.

9. Taking all the above considerations into account, I have concluded that the injustice and hardship that would be caused to the claimant in refusing the amendment outweigh the injustice and hardship to the respondent in allowing it. If the amendment were refused, the claimant would be unable to particularise a large part of her claim and accordingly may be unable to lead evidence in support of the general averments she makes in the ET1. She would lose the ability to properly make her case. The injustice and hardship to the respondent in allowing the amendment would be the need to meet a more detailed case and the additional time and expense involved in having to call further witnesses. With regard to the respondent's limitation point, the time bar issues raised by the original claim, which are also present in the particularised amendment are reserved to be determined at the full hearing. The respondent's limitation defence can still be argued in light of the full facts. Taking all the points made by both parties into consideration, it appears to me that the balance of injustice and hardship favours allowing the amendment. It appears to me that the respondent would have required further particulars of the ET1 in any event in order to have fair notice of the case against them. For all the reasons set out above, the claimant's application to amend dated 14 June 2023 is allowed. The respondent has 28 days to respond if so advised.

Employment Judge: **M Kearns**
Date of Judgment: **26 July 2023**
Entered in register: **27 July 2023**
and copied to parties

I confirm that this is my Judgment in the case of Mrs P McArthur v Lidl Great Britain Limited 8000029/2022 and that I have signed it by electronic signature.