EMPLOYMENT TRIBUNAL

Claimant: Ms. Ezzahra Azaanoun

Respondent: Reed Specialist Recruitment Ltd.

Hearing: Public Preliminary Hearing

Heard at: London Central ET (via video/CVP)

On: 7 August 2023

Before: Employment Judge Tinnion

Appearances: For Claimant: In person
For Respondent: Mr. F. Clarke, Counsel

JUDGMENT

1. The Claimant's application to amend her ET1 is not granted.
2. The Claimant's ET1 does not contain any claims which were presented in time.
3. There are no claims in the Claimant's ET1 in respect of which it is just and equitable to extend time.
4. There are no claims in the Claimant's ET1 which have any reasonable prospect of success.
5. The Claimant's claims in the ET1 are struck out under Rule 37(1)(a) (no reasonable prospect of success).
6. The Respondent's application for a deposit order is moot and dismissed.

REASONS

Background

1. The Respondent (part of the Reed Group) is a recruitment agency which seeks employment for candidates on its books with external potential third party employers (**PTPEs**).

2. In July 2022, the Claimant – a non-married female of Berber/Moroccan ethnicity who describes her skin colour as "*olive*" - signed up to use the Respondent's recruitment services [80]. The Respondent duly arranged interviews with PTPEs for the Claimant (Meritor, Mayflex), which she attended. Her interviews were unsuccessful, and the Claimant was not offered employment.

3. On 15 August 2022, the Claimant complained about the "*attitude*" of one of the Respondent's consultants. By email on 18 August 2022, the Claimant provided further details of her complaints, some of which concerned her treatment by the TPPEs during her interviews, some of which concerned the Respondent (failing to prepare her for her interviews, being contacted by phone rather than email, being sent any emails at all). By email on 18 August 2022, the Claimant complained the Respondent had contributed and encouraged her mistreatment by the PTPEs [102].

4. By email on 19 August 2022, the Respondent notified the Claimant that her complaints had been escalated to its HR team for investigation [102]. By email on 1 September 2022, R Russell (Midlands Regional Managing Director) provided a response to the Claimant's complaints [112-113]. By email on 2 September 2022, the Claimant replied complaining Mr. Russell had used her first name, and claimed this showed "*lack of respect and constant harassment*" [112].

5. By letter dated 2 September 2022 [114-115], the Claimant made what she described as a "*formal complaint of discrimination, harassment and victimisation*" [114-115]. Her letter expressly referred to the "Act", ie, the Equality Act 2010.

6. By letter dated 15 September 2022 [116-123, plus appendices], HR Advisor S Griffiths provided a detailed substantive response to the Claimant's 18 August 2022 email and 2 September 2022 letter. In sum, her letter stated the Respondent was not responsible for the conduct of the two PTPEs and denied its staff had mistreated the Claimant. Her letter ended by stating "*The outcome reached is final*." [123].

7. By a "*letter before action*" dated 29 October 2022 [125], the Claimant referred to the Respondent's 15 September 2022 letter (establishing she received it and read it) and made a request for "*details of ADR in order to avoid court proceedings*".

8. By email on 4 November 2022 [126], Ms. Griffiths replied summarising what had been done to date and stated "*we consider the matter to be closed*.".

<u>Statements of case</u>

9. On 2 February 2023 – within 3 months of Ms. Griffith's 4 November 2022 email, but more than 3 months after all other relevant events - the Claimant contacted ACAS regarding a potential claim against "*Reed*" [17]. On 16 March 2023, ACAS issued an Early Conciliation Certificate [17].

10. By an ET1 Claim Form presented on 5 April 2023 [5-16], the Claimant stated and/or ticked boxes on that ET1 indicating she was bringing the following claims against the Respondent (some of the claims may overlap): (i) age discrimination (ii) race discrimination (iii) sex discrimination (iv) marriage/civil partnership discrimination (v) direct discrimination (vi) indirect discrimination (vii) harassment (viii) victimisation

(collectively, the "**Claims**").

11. It is important to note the Claimant's ET1 contains no factual allegations whatsoever, (a proposition which the Claimant accepted) and no written grounds of complaint (or similar document) were attached to her ET1 setting out the factual basis upon which she sought to bring any of the Claims against the Respondent. Although the Claimant says she was subject to discrimination during her interviews by the PTPEs, she has not presented an ET1 naming those third parties as respondents, nor has she sought to add any PTPEs as respondents to the existing ET1 Claim Form against the Respondent.

12. By an ET3 [27-32] and Grounds of Resistance dated 19 April 2023 [35-38], the Respondent (identified then as the Reed Group because the precise legal entity the Claimant brought her claim against was not yet clear) (a) noted the ET1 gave no indication of the facts giving rise to the Claimant's claims (b) noted the Respondent's right to seek an order under Rule 37(1)(a) on the basis that the Claimant's claims were bound to fail (c) denied the Claimant's claims.

Preliminary Hearing on 7 August 2023

13. The Tribunal originally listed a Preliminary Hearing for Case Management on 7 August 2023. By email on 4 July 2023, the Respondent's solicitors asked for that hearing to be converted to an Open Preliminary Hearing to consider its strike out application on the basis that (a) the Claimant's claims had not been brought in time (b) even taken at their highest, the Claimant's claims lacked merit and were bound to fail, hence lacked any reasonable prospect of success under Rule 37(1)(a).

14. By a Case Management Order on 10 July 2023 [35-41] following a PHCM (conducted via CVP) that day, the Tribunal listed a Public Preliminary Hearing (**PPH**) to consider the following issues:

    a. Issue #1 - Claimant's application to amend ET1 to include particulars of her claims given at the PHCM (for which, see CMO paras. 15-29), details of which the Tribunal noted she had given for the first time at the PHCM (para. 30);

    b. Issue #2 - whether the claim should be struck out because it is out of time and the Tribunal does not have jurisdiction to consider it;

    c. Issue #3 - whether the claim should be struck out because it has no reasonable prospect of success;

    d. Issue #4 - whether to make a deposit order relating to Claimant's allegations / arguments because they have little reasonable prospect of success;

    e. Issue #5 - further case management (if appropriate).

15. The PPH was held on 7 August 2023. The Claimant relied upon a 20-paragraph witness statement. The Respondent (whose correct legal name the parties agreed was Reed Specialist Recruitment Ltd) served no witness evidence. A bundle of 131

pages was prepared, references to which are made herein in square brackets. The Claimant was cross-examined. Both parties made oral closing arguments.

Relevant law: application to amend

16. The principles governing contested applications to amend claims (and responses) are set out in Selkent Bus Company v Moore [1996] ICR 836, Abercrombie v AGA Rangemaster [2014] ICT 209, and Vaughan v Modality Partnership [2021] ICR 535.

17. A key principle is the need in each case to balance competing factors in order to reach a decision regarding an application to amend; to balance the injustice/ hardship of allowing an amendment, against the competing injustice/hardship of refusing it.

18. In determining whether or not to permit an amendment, the paramount considerations are the relative injustice and hardship which flow from the decision, having regard to the practical consequences of refusing or allowing the amendment. Some of the factors which arise may be common to most cases, others may be unique to the case before the Tribunal.

19. In Vaughan the point was made that 'labelling' those different factors, or the cases in which some arise, is not the correct approach. A labelling exercise should not be used as a shortcut around the balancing exercise - the risk in doing so is that impermissible 'short cut' judicial decisions may occur (eg, a 're-labelling' case where the same facts are relied upon in respect of a proposed amended head of claim is likely to lead to an application to amend being granted, whereas a new facts / 'new cause of action' case will not) without a proper balancing exercise being undertaken. Rather than focus on the type of case, or label ascribed to it, it is more important to look at the practical consequences of allowing/refusing the amendment.

20. When a party is unrepresented, Tribunal should be live to the potential need to adopt a "more inquisitorial approach" to ascertain where the balance of hardship and injustice lies. Further, amendments which might have been avoided had more care been taken when the claim was originally drafted are best avoided given the costs and delay they are likely to cause (which may be relevant considerations in respect of an application to amend). However, the key consideration remains the balance of justice and hardship – see Vaughan, para. 28.

Issue #1 (Claimant's amendment application)

21. The Tribunal's starting point is to consider the balance exercise, ie, the injustice/hardship that will be caused to the Respondent if the Claimant's amendment application is allowed versus the injustice/hardship that will be caused to the Claimant if her amendment application is not allowed. In this case, it is clear that the balance of hardship will be extremely stark to the 'losing party' no matter what decision the Tribunal ultimately makes.

22. The practical consequence of denying permission to amend is that the Claimant will be limited to the claims in her existing ET1 and will not be able to pursue the claims which she now wishes to bring against the Respondent in the instant ET proceeding.

In the Tribunal's judgment, that limitation will impose a serious hardship on her (although not necessarily an injustice, as the situation is one entirely of her own making) because her claims in her existing ET1 are, to all practical intents and purposes, non-existent – although the ET1 contains some broad indications of the legal cause of action she intends to assert, what her ET1 entirely omits are the factual allegations/particulars upon which those causes of action are based. In the Tribunal's judgment, the Claimant's existing "claims" in her ET1 – if that is the right term to apply in a situation where there are no factual allegations whatsoever in an ET1 – are bound to fail and have no reasonable prospect of success.

23. Mitigating that hardship (admittedly only to a limited extent) is the fact that refusing the application to amend will not bar the Claimant from presenting a fresh ET1 which properly particularises the factual allegations she now wishes to make in support of her causes of action against the Respondent (and any other respondents she chooses to name). Although it would not be for this Tribunal to determine, it is not obvious that a second ET1 would necessarily be liable to be struck out on the basis that it constitutes an abuse of process (the situation would be different if the existing ET1 contained any factual allegations which were repeated in a second ET1).

24. On the other hand, the practical consequence of granting permission to amend will be that the Respondent will move from a situation in which it has effectively no case to answer at all to one in which it will have to respond to a large number of new factual allegations and defend a large number of claims based on those allegations. The Claimant's application cannot fairly or properly be described as a mere 'relabelling exercise' – none of the Claimant's causes of action are changing, what is changing are the underlying factual allegations (from a situation where there are none whatsoever to a situation in which there are many).

25. The Tribunal believes the situation which has arisen could have been avoided had the Claimant's ET1 been drafted with more care. The Tribunal accepts the Claimant's explanation that her ET1 did not contain any factual allegations because she did not know it had to contain them – she believed (wrongly) they could simply be added later on. However, those facts, while they help to explain the Claimant's conduct, do nothing to mitigate the hardship the approach she mistakenly adopted has caused the Respondent.

26. If the amendment application is allowed, the Respondent will suffer the additional hardship that it has to defend increasingly historic allegations which concern not just its conduct but the alleged conduct of two PTPEs – Meritor, Mayflex - entirely outside of its control.

27. Unlike the Claimant, there is no step the Respondent can take to mitigate the hardship that will arise if the Claimant's amendment application is allowed – it will have no choice but to defend the new claims on their merits (including taking jurisdiction/time points where appropriate).

28. In making its decision, the Tribunal notes the following:

29. First, all bar one of the Claimant's claims concern acts/omissions by the Respondent – for which see [38-39, paras. 15-27] – which occurred before 3 November 2022.

The Claimant having contacted ACAS on 2 February 2023, subject to the applicability of the 'continuing act' doctrine, those claims are prima facie out of time.

30. Second, in respect of the one act by the Respondent which the Claimant wishes to bring a claim about (the Respondent's brief email on 4 November 2022 responding to her request for ADR stating that the Respondent considered the matter closed) which would be in time if permission to amend the ET1 to include it were permitted, the Tribunal is not satisfied this claim (if allowed) enjoys reasonable prospect of success. The Respondent's 15 September 2022 letter notified the Claimant of its conclusions and findings following its investigation into the Claimant's complaints, and stated the outcome reached was final. The Respondent's 4 November 2022 did no more than repeat that position (it changed nothing), and there is no evidence the Respondent offered an ADR procedure (which is what the Claimant's 29 October 2022 email requested) which it improperly denied her. The Claimant's witness statement makes no express reference to the 4 November 2022 email.

31. Taking all of the above into consideration, the Tribunal's ultimate conclusion is that although both parties will suffer very significant hardship if the Claimant's amendment application is granted or (as the case may be) denied, the Respondent will suffer greater hardship if the application is allowed than the Claimant will suffer if it is denied. The Tribunal is also satisfied the Claimant will not suffer an injustice (as opposed to hardship) if her application is denied. On that basis, the Claimant's amendment application is denied.

Issue #2 (Whether Claimant's ET1 should be struck out because it is out of time)

32. The Claimant's ET1 Claim Form [5-16] does not contain any claims against the Respondent. On that basis, the Tribunal is satisfied it does not contain any claims which have been presented within any applicable time limit. There are no claims in the ET1 which it is just and equitable to extend time for. The ET1 is struck out under Rule 37(1)(a) (no reasonable prospect of success given lack of jurisdiction).

Issue #3 (Whether Claimant's ET1 should be struck out under Rule 37(1)(a) (claims lack any reasonable prospect of success)

33. For the reasons already given, the Tribunal is satisfied the Claimant's claims in the ET1 (if there are any) lack any reasonable prospect of success, and therefore strikes out the ET1 on that ground as well under Rule 37(1)(a).

Issue #4 (Deposit order)

34. In light of the conclusions and decisions above, the Respondent's application for a deposit order is now moot and dismissed on that basis.

Issue #5 (Further case management directions)

35. In light of the conclusions and decisions above, there is no need for the Tribunal to make any further case management directions.

Signed (electronically): Employment Judge Antoine Tinnion

Date of signature: 25 August 2023

Date sent to parties: 25 August 2023