EMPLOYMENT TRIBUNALS

Claimant: **Mrs Rajni Peter**

Respondents: **Atos IT Services Limited**

Heard at: **London South (by CVP)** **On:** **5 June 2023**

Before: **Employment Judge Cheetham KC**

Representation

Claimant: Richard Gulvez (husband)
Respondent: Leo Davidson (counsel)

JUDGMENT

1. The application to amend the list of issues is refused and the Tribunal and the parties will continue to use the list of issues agreed at the Preliminary Hearing on 3 March 2022.

REASONS

1. This is a claim that was received by the Employment Tribunal on 31 March 2021. The Claimant's employment commenced on 2 February 2015 and she is employed as a Health Professional.

2. At a Preliminary Hearing held on 3 March 2022 (EJ Nash), at which the Claimant was represented, the issues in the case were listed and agreed, subject to either party being able to notify the Tribunal within 2 weeks if it thought the list was wrong or incomplete. This is a disability discrimination claim and there are complaints of harassment, failure to make reasonable adjustments and discrimination arising from disability. The claim was also listed for a 5 day hearing, which was due to start today.

3. On 26 March 2023, the Claimant sent an amended list of issues, which was

several times longer than the concise agreed list. On 28 April 2023, EJ McLaren ordered today's hearing to be converted to a half day Preliminary Hearing to consider the application to amend, which was opposed by the Respondent.

The Law

4. In the recent case of ***Vaughan v Modality Partnership*** [2021] ICR 535, EAT, HHJ Tayler provided guidance on the correct approach to adopt when considering an application to amend. He referred to ***Cocking v Sandhurst (Stationers) Ltd*** [1974] ICR 650 and to ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836, which has the well-known words of Mummery LJ:

> *"Whenever the discretion to grant an amendment is invoked, 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."*

5. HHJ Tayler noted that the list of relevant factors set out in ***Selkent*** did not mean that tribunals should adopt a check-list approach, as emphasised by Underhill LJ in ***Abercrombie v Aga Rangemaster Ltd*** [2014] ICR 209, CA. That case also contained this useful passage (at §48).

> *"… the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."*

6. At §21 of ***Vaughan***, there is this summary of the correct approach to take:

> *"Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the **Selkent** factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis of instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim."*

7. At §22, HHJ Tayler went on to say:

> *"Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party 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 because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later."*

8. Finally, he gave a reminder that no one factor is likely to be decisive. The balance of justice is always key.

The application

9. On behalf of the Claimant, Mr Gulvez said that their representative at the previous hearing had agreed the issues, but that this did not reflect everything they had sent him prior to the last hearing. The representative had summarised the issues, but there was a lot more that needed to be elaborated. This extended list set out all of the things that they wished to say.

10. Mr Gulvez also emphasised his wife's ongoing health issues and it was obvious that she was distressed by these proceedings. He said that it was unfair that the list of issues did not contain everything that she felt was relevant.

11. As the Tribunal did its best to explain, a list of issues does not need to set out in great detail everything a party will wish to address in its witness evidence. It is – or should be – a concise summary of a claim, which allows the Tribunal and the parties to focus on the essential issues in the claim. That is what the agreed list of issues in this claim already provides, whereas the Claimant's proposed amended list would not do so. The place for the elaboration is in the witness evidence.

12. Although Mr Gulvez did not accept this, the Tribunal explained that the current list of issues does not prejudice the Claimant at all, as it sets out what needs to be decided under the headings of the various complaints, which in turn reflects the Claimant's particulars of claim. The proposed amended list goes far beyond that, adding numerous very detailed questions, but it is unnecessary for it to do so.

13. It also raises new issues, including a complaint of indirect discrimination, various alleged breaches of duty and a claim for personal injury. However, the only reason Mr Gulvez could provide as to why these further complaints could not have been raised previously was that the previous representative had not – for whatever reason - raised them at the Preliminary Hearing. He did not have anything to say about the considerable impact the amendment would have on the size and shape of the case and its future hearing.

14. When one goes back to the particulars of claim, it is clear that the current list of issues reflects what the Claimant set out as her complaints when she brought

the claim. While sympathising with Mr Gulvez that, on further reflection, there is more that the Claimant would like to have said, he was not able to offer any persuasive reasons at all why such a wholescale amendment to the claim should be allowed nearly two years after the claim was brought and when the list of issues has already been considered and agreed at a Preliminary Hearing.

15. For those reasons, the application to amend is refused. A separate case management order accompanies this Judgment.

_____

Employment Judge Cheetham KC

_____

Date 30 June 2023