EMPLOYMENT TRIBUNALS

Claimant: Ms Y Hood

Respondent: Leicestershire Partnership NHS Trust

On: 27 and 28 September 2023

Before: Employment Judge Ahmed (sitting alone)

At: Leicester (Hybrid CVP)

Representation
Claimant: In person
Respondent: Mr Jonathan Heard of counsel

JUDGMENT ON AN APPLICATION FOR AMENDMENT AT A PRELIMINARY HEARING

The decision of the Tribunal is that;

1. The Claimant has leave to amend her claim in the terms of the Scott Schedule contained within the bundle for this preliminary hearing save for those amendments in paragraph 2 below which are refused.

2. The Claimant's application to amend her claim in respect of the amendments set out below are refused. Page numbers and items are by reference to the bundle for this preliminary hearing.

The amendments refused are contained in the following pages:

page 644 (item 21);

page 648;

page 649,

page 651,

page 656 (in particular item 3.1 and the addition of incidents on 3 June 2020 and 23 June 2020);

page 658 (in particular the paragraph beginning with “additional another patient’s records……management notes.”

pages 659 – 662 (in particular item 5 and the additional names in the 3rd column)

page 665 (item 23 – all three columns from the left)

pages 672 - 674 (in particular everything that is new under item 24)

page 680 (item 250)

page 684- 686 (in particular the entirety of item 26)

REASONS

1. This was a hybrid CVP hearing to determine an application for an amendment by the claim of her claim. The original claim form (ET1) was relatively brief. It is now agreed that the Claim in these proceedings is encapsulated in the form of a Scott Schedule, which itself has undergone several iterations. The latest version is now found in the bundle for this Preliminary Hearing at pages 594 onwards. Although the Claimant does not agree with all that is included in the bundle she *does* agree that her amendment application is set out mostly (though not always) in tracked changes which appear as italicised words in the latest version of the Scott Schedule. Page numbers in this decision are to the bundle for this Preliminary Hearing.

2. The Claim Form was presented to the Tribunal on 19 August 2020. The application for the present amendment was made in general terms on 17 July 2023 and on 22 August 2023 the actual proposed wording of the amendments were set out in the Scott Schedule.

3. The Respondent’s position is that they do not object to amendments in relation to matters where the claimant is merely correcting dates, particularising previously identified claims and is not seeking to add anything more substantive than that which has already been alleged. In relation to those proposed amendments I can deal with the application by consent and grant those amendments as they are not opposed.

4. The Respondent does however object to those amendments where they say the claimant is seeking to add new and fresh allegations of disability discrimination and where the claimant is seeking to add further alleged protected disclosures and/or detriments.

The amendment sought

Discrimination arising from disability complaint

5. The Claimant seeks to add an allegation of unfavourable treatment relating to an inability to make retrospective entries to her NHS record and that Dr Bowlay-Williams (one of those alleged to have discriminated against her) removed the Claimant’s access to the ERS for the Claimant to update and complete draft notes.

Whistleblowing claim

6. The Claimant seeks to add to the existing list of alleged protected disclosures as follows:

6.1 In respect of the first protected disclosure the Claimant has added further potential disclosures made on 5 and 6 March 2020;

6.2 The Claimant seeks to add two more disclosures to the third protected disclosure;

6.3 The Claimant seeks to add a further disclosure which is to be found at the top of page 659;

7. The Claimant seeks to add the following additional detriments:

7.1 At item 22 on pages 659 – 662, the Claimant has added four new dates which appear to refer to additional detriments. Those dates are given without explanation or commentary;

7.2 At item 23 on pages 665 – 666, the Claimant has added five dates regarding a new allegation about exclusion from events;

7.3 At item 24 on pages 672 -674, the Claimant has referred to making a protected disclosure in her grievance which was not one of the four originally identified alleged protected disclosures;

7.4 At item 25 on page 680 the Claimant appears to rely on additional alleged disclosures and detriments;

7.5 At item 26 on page 684 the Claimant seeks to add a new detriment in respect of allegations about events on 31 March 2020.

The law on amendment applications

8. The leading authority on amendments is *Selkent Bus Company v Moore* [1996] IRLR 661. In that case the Employment Appeal Tribunal made it clear that in deciding any amendment application it is necessary to take into consideration *all* of the circumstances and in doing so the Tribunal should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

9. *Selkent* identifies particular factors which the Tribunal should take into account in deciding whether to allow an amendment. They include:

9.1 The nature of the amendment: the tribunal should consider 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 or, on the other hand, whether it is a substantial alteration making entirely new factual allegations which change the basis of the existing claim.

9.2 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 would now be out of time and, if so, whether the time limit should be extended under the applicable statutory provisions. I should add that following the decision in *Galilee v Commissioner of The Police of The Metropolis* [2018] ICR 634 an amendment can be allowed subject to the time point being left for determination at the final or later hearing.

9.3 The timing and manner of the application: although the rules do not lay down any time limit for the making of amendments and furthermore 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.

10. In the more recent case of *Vaughn v Modality Partnership* [UKEAT/1047/20] the Employment Appeal Tribunal made it clear that one of the primary considerations should always be to consider what the real practical consequences are of allowing or refusing the amendment.

11. In *Chaudhry v Cerberus Security and Monitoring Services Limited* [EA- 2020 – 000381-00] the Employment Appeal Tribunal suggested a two-stage process might be helpful in considering applications for an amendment: firstly, to identify the amendment or amendments sought and secondly, in express terms to balance the injustice and/or hardship of allowing or refusing the amendment or amendments, taking account of all the relevant factors, including, to the extent appropriate, those factors referred to in *Selkent*.

Conclusions

12. I am satisfied that this is not a re-labelling exercise and the proposed amendments are not of a minor nature. They would in most cases require fresh lines of factual enquiry. The Claimant is clearly seeking to introduce new and specific allegations which would need to be considered on their merits. It is not a case of simply replacing one legal label for another.

13. I am not wholly satisfied that there is a good reason proffered for the delay in making the application. The Claimant suggests that it is only recently after she has received Counselling and Mental Health Therapy that she has been able to remember clearly details of the past. Whilst it is pleasing that the Claimant's mental health has improved as a result of treatment it is difficult to see how the Claimant would now be able to remember very specific dates and facts on matters which occurred some three years ago or longer with such precision. It seems more likely that a recent partial disclosure of documents by the Respondent has caused her to look at the matter afresh and consider adding in more allegations.

14. Considering the first step identified in *Chaudhry* as to the identification of the proposed amendment it seems to me there is a lack of clarity in some of instances of what the Claimant is seeking to add. The Claimant merely inserts dates and names without a proper explanation of what she is seeking to add or argue. Dates and names are given without explanation and in the case of some of additional alleged protected disclosures there is no indication of what information she is said to have disclosed. It is not sufficient in my view to say that the disclosure is there in the grievance document without identifying what is alleged to amount to a disclosure, why it was 'information' and how it amounts to a protected disclosure. I appreciate the Claimant is a litigant in person but she is clearly an intelligent woman and has

gone through several preliminary hearings previously some of which have involved amendment issues. By now she must appreciate the importance of giving specific details rather than stating generalities. Generalities can sometimes be resolved by requests for further information but in this case there is very little time to do so.

15. The crucial issue is of course the balance of hardship. I am satisfied that the balance of hardship favours the Respondent for the following reasons:

15.1 The proposed amendments would lead to new and different lines of enquiry than those already identified. These are new allegations and these require further investigation. It is facile to suggest that they do not.

15.2 To allow the new allegations and issues to be added would seriously place the final hearing in January 2024 (which is now only 3 months away) at serious risk. The full hearing which is listed for 17 days has already been postponed twice and further delay is to be avoided if at all possible.

15.3. It seems to me that the Claimant will suffer little or any hardship by a refusal of the amendment other than the opportunity to argue additional matters of existing claims. She already has a whistleblowing claim with several alleged protected disclosures. It is difficult to see what these additional alleged disclosures will add. They are unlikely to lead to more compensation if she succeeds. The only disadvantage is a decrease in the number of allegations and potential detriments. The Respondent on the other hand will need to investigate, at a very late stage in the proceedings a number of new lines of enquiry, some of which still remain unparticularised.

15.4 The absence of clarity of some of the proposed amendments will mean further to-ing and fro-ing between the parties before witness statements can be completed. If these amendments were allowed in their present form they would almost certainly require further and better particulars for which there is very little time.

15.5 The Respondent will need to, at least, amend their Grounds of Resistance, interview potentially new witnesses or re-interview existing witnesses and engage in disclosure of a wider nature. I do not accept that the documentation alone provides the answers – new allegations will require a fresh response. The amount of work that would be required would be quite significant. It would put the Respondent in real difficulties through no fault of their own.

16. For those reasons the application to amend is refused.

Employment Judge Ahmed

Date: 12 October 2023

JUDGMENT SENT TO THE PARTIES ON

13/10/2023.....

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FOR THE TRIBUNAL OFFICE

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