



5

EMPLOYMENT TRIBUNALS

Claimant: Ms Adele Smith

Respondent: Dunton Environmental Limited

Heard at: Midlands West **On:** 6 October 2023

Before: Employment Judge Gilroy KC

Representation

Claimant: In person

Respondent: Mr Ishfaq Ahmed (Counsel)

JUDGMENT ON A PRELIMINARY HEARING ORDER

1. The Claimant is granted permission to incorporate the paragraphs 3, 4, 4.1, 4.2 and 14 of the order made by the Tribunal at the preliminary hearing on 14 April 2023 in her Grounds of Claim.
2. By no later than 4.00 pm on Friday 24 November 2023, the Respondent shall serve on the Claimant, and file with the Tribunal, a List of Issues it contends the Tribunal will be required to determine at the final hearing in this case.
3. By no later than 4.00 pm on Tuesday 19 December 2023, the Claimant shall confirm to the Respondent and to the Tribunal whether and to what extent she agrees with the Respondent's suggested List of Issues, and to the extent that she disagrees with the Respondent's List, the Claimant shall provide the Respondent with her List of Issues and lodge the same with the Tribunal by the above-stated deadline.
4. There shall be another Case Management Preliminary Hearing on Monday 8 January 2024. In advance of that hearing, the parties shall liaise with a view to either agreeing the List of Issues or narrowing down the areas of dispute in relation thereto.

REASONS

Background

1. This is the second determination made by the Tribunal at the preliminary hearing conducted on 6 October 2023 in relation to the various claims brought by the Claimant against the Respondent. The Tribunal earlier ruled that, at the time of the events which form the basis of this claim, the Claimant was not a disabled person by reason of the condition of Attention Deficit Hyperactivity Disorder, "ADHD".
2. This judgment deals with the Claimant's application to amend her claim form.
3. The claim form in this matter was issued on 30 June 2022. The attached Grounds of Claim contained the following:

(At paragraph 4): *"This claim is for unpaid sick pay and holiday pay, discrimination, harassment and victimisation under the protected characteristics of sex, gender reassignment, disability, sexual orientation and sexual harassment. The claimant also received detriment for making a protected disclosure."*

Paragraphs 5 to 8 contained details relating to a claim for breach of contract.

Paragraphs 9 to 11, under the heading "Claims under protected characteristics", contained the following:

"9. During the claimant's employment with DUNTON TECHNOLOGIES LIMITED Members of Dunton Technologies team, namely, LOUISE BARTON, PHILLIP BENTLEY, JOHNATHAN HILL, JAMES HILL, LARA ROW and ADRIAN JEFIMIUCK, TONY SALDER made a hostile working environment by using direct discrimination, victimization and harassment under the protected characteristics; disability, sexual orientation, sexual harassment, gender reassignment and sex. One team member in particular used language of a threatening nature which was directed at the claimant. During this period a member of this team also exposed that other members of staff (TIM LANDRITH) that was involved in this type of harassment and victimisation.

10. During the claimant's employment with Dunton environmental LTD they received direct, indirect discrimination victimization and harassment under the protected characteristics; disability, sexual orientation, sexual harassment, gender reassignment, sex by MIKE BAILEY, CATHRINE HAGGERMAN, KATIE TWINE, KEGAN WEITENDORF, LARA ROWE, LOUISE BARTON, MARICK (last name unknown), TONY SALDER, PHILLIP BENTLEY, JOHNATHAN HILL, TIM LANDRITH.

11. Please note that the names listed may not be implicated in all but may only be in some of the discrimination claim and or victimization and or harassment".

At paragraphs 12 to 23 of the Grounds of Claim, the Claimant provided details of "a claim for Whistleblowing detriment under s47B ERA 1996".

At section 8 of the claim form, the Claimant indicated, by the placing of "ticks" against the relevant boxes, that she was claiming unfair dismissal and discrimination on the grounds of gender reassignment, sexual orientation, disability and sex. She also intimated a claim of sexual harassment. The Claimant ticked the unfair dismissal box despite the fact that she had less than two years' continuous service.

Box 8.2 of the claim form also contained factual details of the claims, but nothing additional to the wording contained within the Grounds of Claim.

4. Given the lack of proper particulars provided in the claim form/Grounds of Claim (to a large extent across the board), by an e-mail sent on 5 August 2002, the Respondent, amongst other things, submitted to the Tribunal (cc the Claimant) a detailed Request for Further and Better Particulars of the Grounds of Claim. No order was made in respect of that Request, and the Claimant did not voluntarily respond to it.
5. A preliminary hearing was conducted for case management purposes on 8 February 2023 before Employment Judge Harding, when the claims were discussed in some detail. As Employment Judge Harding observed at that hearing: *".....it was not possible to discern from the narrative section of the claim form specifically what legal claims the claimant was pursuing"*. The Claimant gave an outline of her intended claims under the following headings: *"Public interest act disclosure (whistleblowing) claim, Disability discrimination, Failure to make reasonable adjustments"*, and *"Section 15: discrimination arising from disability"*.
6. At the hearing on 8 February 2023, the Claimant indicated that she did not wish to pursue claims for sex discrimination or sexual harassment, but that she did wish to pursue a claim of victimisation, as well as claims for discrimination on the grounds of sexual orientation and perception of gender reassignment.
7. Employment Judge Harding directed that there should be a further case management preliminary hearing and that in advance of that hearing the Claimant should prepare a document which she could use as an aide memoire at the next hearing, containing, as best as she was able to set it out, the particular acts and or omissions of the Respondent which she maintained amounted to Section 15: discrimination arising from disability, Victimisation, Sexual orientation discrimination/harassment, Discrimination based on the perception of being transgender and Money claims. The Claimant was not required to share that document with the Respondents or the Tribunal.
8. The further case management preliminary hearing duly place on 14 April 2023, again before Employment Judge Harding, and at that hearing, the Claimant, when asked to provided details of her claims, provided the particulars which are set out at paragraphs 3 to 14 of the order made at that hearing, under the following headings: Public Interest Act disclosure (whistleblowing), disability discrimination, failure to make reasonable adjustments, s.15 discrimination arising from disability, direct disability discrimination, discrimination on the grounds of being non-binary, discrimination on the grounds of sexual orientation, victimisation, and non-payment of holiday pay/sick pay. It is to be noted that at paragraph 5 of the order made on 14 April 2023 there was mention, for the first time, of a claim of automatic (whistleblowing-related) unfair dismissal contrary to s.103A of the Employment Rights Act, albeit at paragraph 5.3 of the order made at the 8 February 2023 preliminary hearing, the Claimant being *"forced.....to resign"* was referred to in the list of detriments alleged by the Claimant in connection with her whistleblowing claim.
9. It was noted by Employment Judge Harding at the preliminary hearing on 14 April 2023 that in relation to all of the matters itemised at paragraphs 3 to 14 of the order the Claimant referred to at that hearing, to the extent that all or any of the details contained in those paragraphs would, if incorporated within the Claimant's

claims, amount to an amendment to the Claimant's claim form, no permission to amend had been granted.

10. Employment Judge Harding then gave directions for a preliminary hearing to be convened for the Claimant to apply for permission to amend her claim form, including a direction that the Claimant send a witness statement to the Respondent containing evidence relevant to any potential amendment application, including the following: (a) in the event that the Claimant accepted that some of the matters set out at paragraphs 3 to 14 of the Tribunal's order of 14 April 2023 were new, why these were not included in her claim form, (b) whether she wrote her claim form herself or had assistance doing it and if so from whom, (c) if she did not write the claim form herself whether the person who wrote her claim form had knowledge of the specific claims, (d) whether the Claimant took any advice prior to submitting her claim (without disclosing the content of any such advice), (e) what the Claimant knew about the tribunal procedure, and (f) what the Claimant knew about tribunal time limits.
11. The claim form was issued against Dunton Environmental Limited and Dunton Technologies Limited. The former is primarily concerned in the construction business, and in particular ground works and remediation. The latter is a waste treatment business. The Claimant was employed by Dunton Environmental Limited and at no stage had any formal relationship with Dunton Technologies Limited. At the preliminary hearing on 14 April 2023, Employment Judge Harding issued a consent order whereby the following claims were dismissed on withdrawal: (1) direct sex discrimination, harassment related to sex/sexual harassment and unfair dismissal, and (2) all claims against Dunton Technologies Limited. Two particular consequences flowed from the latter order. The particulars set out at paragraph 9 of the Grounds of Claim (see paragraph 3 above) were, in effect, rendered null and void, and the only particulars contained within the claim form and the Grounds of Claim of the claims of direct, indirect discrimination victimisation and harassment on the grounds of disability, and/or sexual orientation, and/or gender reassignment, and/or sex were the particulars set out at paragraph 10 of the Grounds of Claim (again see paragraph 3 above).
12. When filing a witness statement dated 10 May 2023 in support of her application to amend her claim form, the Claimant said this:

“For the avoidance of doubt, I agree that paragraphs 3 to 14 of the Tribunal’s Order on a Preliminary Hearing (14 April 2023) contained matters which are new to the claim, and which amount to an application to amend.”
13. For the purposes of this judgment, the orders issued by the Tribunal following the preliminary hearings on 8 February 2023 and 14 April 2023, together with the Claimant’s witness statement dated 10 May 2023, are taken “as read” (in other words, those orders and that statement will need to be read in conjunction with this judgment in order to make sense of those parts of this judgment dealing with the Claimant’s application to amend her claim form).
14. Before dealing with the substance of the application to amend, it is necessary to address one matter which arises as a result of the Tribunal's determination that the Claimant was not, for the purposes of her claim, a disabled person by reason of the condition of ADHD. Certain of the claims the Claimant wishes to pursue by way of an amendment relate to allegations of discrimination concerning the condition of ADHD. Clearly, no such claims are available to her now in the light of the Tribunal's above ruling. Accordingly, for the avoidance of doubt, referring to the

order made at the preliminary hearing on 14 April 2023, the application to amend could not cover/include the matters canvassed at paragraphs 10.1, 10.2, 10.3, 10.4, 11.1, and the ADHD aspect of paragraphs 10.5 and 11.2¹ of that order. What remains, therefore, are paragraphs 3 to 14 minus the above-identified paragraphs.

15. The net effect of all of the above is as follows:

15.1. The Claimant's application for leave to amend her claim form was an application for permission to incorporate the details contained within paragraphs 3 to 14 of the order of 14 April 2023 within her claim form/Grounds of Claim, save for the paragraphs excluded on the basis indicated at paragraph 14 above.

15.2. Prior to the preliminary hearing held on 8 February 2023, the only details the Respondents had been provided with by the Claimant of her claims were as follows:

Non-payment of holiday pay/sick pay (unlawful deduction claims)

Being forced to take holiday and paid holiday pay rather than sick pay in respect of the following three periods:

- (i) 28 December 2021 to 17 January 2022 (the Claimant says only 4 days of this was paid as sick pay).
- (ii) From 5 October 2021 for 5 days.
- (iii) 25 to 26 November 2021.

Protected disclosure detriments

Detriment(s) because the Claimant disclosed that a potential criminal offence had been committed by an employee the Claimant has pseudo named 'Fred'.

Detriment(s) because the Claimant disclosed that a health and safety risk to a number of children attending a rugby club was posed by 'Fred'.

15.3. At the preliminary hearing held on 8 February 2023, the Claimant provided the Respondent with the following further details relating to her claims:

Automatic unfair dismissal

(Possibly): Being forced to resign at a meeting on 3 February 2022.

Failure to make reasonable adjustments

The Respondent should have allowed the Claimant to use a meeting room or other quiet place when writing e-mails or given her a programme such as Grammarly.

¹ As a result of typographical error, there are two separate paragraphs within the order made at the preliminary hearing on 14 April 2023 which each bear the number '11.2'. The reference at paragraph 14 above to "paragraph 11.2" is a reference to the first paragraph bearing that number in the order made at the preliminary hearing on 14 April 2023.

The Respondent should have allowed the Claimant to record meetings.

S.15 Discrimination arising from disability

The “something” which caused the Claimant to resign was said to be her failure to meet deadlines at work, this being said to result from her dyslexia.

- 15.4. Prior to the preliminary hearing held on 14 April 2023, the Claimant had provided the Respondents with no details of the following claims (other than reciting the various causes of action, and the names of several individuals collectively at paragraph 10 of her Grounds of Claim):

Direct disability discrimination

Discrimination on the grounds of being non-binary

(At the preliminary hearing on 14 April 2023, the Claimant stated that she wished to pursue this claim in substitution for the claim she had intimated at the preliminary hearing on 8 February 2023 of discrimination on the grounds of being perceived as transgender).

Discrimination on the grounds of sexual orientation

Victimisation

16. In essence, in support of her application, the Claimant pointed to the fact that she has no legal background, and that when she drafted her claim form her mental health was not such that she was necessarily fully able to comprehend the basis upon which she should formulate her claims. She had been working under the assumption she would be permitted to provide further particulars, as she put it, *“down the line, once she was in receipt of legal advice”*
17. In relation to the claim of automatic unfair dismissal, the Claimant stated that she was of the belief that unfair dismissal could not be claimed unless the individual concerned met the qualifying period of 2 years’ service and she was not aware that this was a requirement for a claim of automatic unfair dismissal.
18. The Respondent objected to the application to amend on various grounds. It is the Respondent’s position that additional detriments had been claimed in relation to the whistleblowing detriment claim; that no claim of automatic unfair dismissal had been made in the claim form, and that whilst the Claimant had expressed an intention to assert a claim of failure to make reasonable adjustments which, she maintains, should have been made by the Respondent during her employment, these did not feature in her claim form. In relation to the claim of discrimination arising from disability, no such claim was made in her claim form. The Respondent submitted that the claim form did express an intention to bring a claim for direct discrimination, but no particulars had been provided, albeit such particulars had purportedly been provided at the preliminary hearing on 14 April 2023. As far as the claim in relation to discrimination on the grounds of being non-binary is concerned, the Respondent submitted that the Claimant did not assert that she was non-binary in her claim form. She expressly pleaded her case on the basis that others perceived her as being transgender and/or gay, but no details were given as to any acts which she said constituted discrimination on the ground of that protected characteristic. The Respondent maintained that at paragraphs 3 to 14 of the order made on 14 April 2023, the Claimant had introduced new facts on which

she intended to rely, and as far as any potential claim of victimisation was concerned, again, no particulars had been provided in the claim form of any such claim, and whereas the Claimant did allege that she was owed sick pay following the period of sickness she sustained during her employment, new facts were set out at paragraphs 3 to 14 of the order made on 14 April 2023 purportedly in support of that claim. These had not previously been provided by the Claimant, whether in her claim form or otherwise. The Respondent pointed to the fact that the dates of what it regarded as fresh allegations were such that by the time the Tribunal gives substantive consideration to those matters, more than two years will have elapsed since the dates of the relevant events.

Discussion

19. The seminal case in relation to amendment applications is ***Selkent Bus Company Limited v Moore [1996] ICR 836***, which has been cited for many years as the leading authority in this area. The ***Selkent*** approach requires consideration of (a) the nature of the amendment (is it the addition of factual details to existing allegations, does it amount to the addition or substitution of other labels for facts already pleaded, or does it represent the making of entirely new factual allegations which change the basis of the existing claim?); (b) the applicability of time limits, and (c) the timing and manner of the application (it is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. The ***Selkent*** test also requires that consideration should be given to all of the circumstances, balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
20. Much more recently, the Employment Appeal Tribunal has issued further guidance in this area in ***Vaughan v Modality Partnership [2021] ICR 535***, and ***Choudhury v Cerberus Security & Monitoring Services Limited [2022] EAT 172*** (HH Judge Tayler presiding in both cases). The essential point to be taken from both of those cases is that of paramount importance in the Tribunal's consideration when dealing with an application to amend is the balancing of the injustice and/or hardship of allowing or refusing the proposed amendment.
21. Where time limits are concerned, it is open to a tribunal to determine such matters at a preliminary hearing or leave such matters to be determined at the main hearing of the claims. The issue of time limits (and therefore jurisdiction) is central to the Claimant's application to amend. In my judgment, I have sufficient information to enable me to deal with that application now. Indeed, on the basis of the facts as now known, it would be unfairly prejudicial to the Respondent for the Tribunal to effectively "kick the can down the road", because in those circumstances, the Respondent would be dealing with a much more expansive case than would otherwise be the position.
22. The Claimant referred in her claim form to the time limit concerning claims under the whistleblowing legislation. She was therefore aware of the 3 month time limit for that type of claim. If she was aware of the primary time limit for that type of claim, it is inconceivable that she could have assumed that there would be no time limits in respect of her other claims.
23. The need for the Claimant to make her application to amend the claim form did not arise from the discovery of new information, or new information arising out of disclosure.

24. I do not accept the claims made by the Claimant that she was of the belief that unfair dismissal could not be claimed unless the individual concerned met the qualifying period of 2 years' service or that she was not aware that this was a requirement for a claim of automatic unfair dismissal, given that she did not have 2 years' qualifying service and yet she still claimed unfair dismissal in her claim form.
25. I also do not accept that the only advice or information the Claimant had received in relation to her claims at the time her claim form was submitted was from ACAS. In her Grounds of Claim she made reference to the fact that her claim for whistleblowing detriment was made "*under s47B ERA 1996*". Using the letter "s" before a number is legal shorthand for "section" (ie the section of a statute). "ERA 1996" is an acronym used by employment law practitioners (whether legally qualified or otherwise) as a reference to the Employment Rights Act 1996. Only someone with at least a basic knowledge of employment tribunal proceedings or employment law would know about that acronym. It might conceivably have been suggested that a representative from ACAS could have informed the Claimant what that acronym stands for, but the Claimant does not make that suggestion. It is her position that 'the only information she received when she submitted her claim form "*which remotely resembled advice and guidance*" was from ACAS "*informing (her) of the general deadlines involved in issuing (her) claim*". (Emphasis added).
26. In the exercise of my discretion, I am entitled to have regard to the fact that the Claimant has been less than straightforward in (1) describing her state of knowledge about making claims to an employment tribunal at the time she filed her claim form, and (2) explaining her failure to provide proper particulars of her claims when filing her claim form, as she was directed to do in the Tribunal's order following the preliminary hearing on 14 April 2023.
27. This is a matter which is entirely within my discretion, I have balanced all of the relevant factors in reaching the following conclusions, without stating, as against each conclusion, the precise factors I have applied in each individual instance.
28. The Claimant has chosen to "drip feed" the details of her case to the Respondent over a period spanning from 30 June 2022 to (at least) 14 April 2023. I take account of the Claimant's dyslexia but I do not accept that that condition provides an explanation for the delay in providing anything like proper particulars of the various claims the Claimant seeks to pursue, and I also do not accept that that condition can have had any bearing on the Claimant being less than straightforward with the Tribunal in respect of the matters referred to at paragraph 26 above.
29. Balancing the prejudice and hardship, the Claimant would clearly suffer prejudice if her application to amend is refused. On the other hand, if that application was granted, the Respondent would suffer prejudice (the delay in being made aware of the claims, the staleness of the "new" claims", the potential impact on the quality of the evidence in terms of the memories of the various witnesses, etc) and this is a case where it is likely that there would be difficulties caused by people moving on from the employment of the Respondent, and the consequential issues in relation to the tracing of such people and/or seeking their assistance in giving evidence at the main hearing.

Conclusions

30. The alleged disclosures referred to paragraphs 3 and 4 of the order made at the preliminary hearing on 14 April 2023 ("the 14 April 2023 PH order") were plainly

referred to in the Grounds of Claim. In so far as is necessary, therefore, the Claimant is granted permission to incorporate paragraphs 3 and 4 of the 14 April 2023 PH order in her Grounds of Claim.

31. The detriments referred to at paragraphs 4.1 and 4.2 of the 14 April 2023 PH order either derive from or are closely connected to the detriments referred to at paragraph 18 and 19 of the Grounds of Claim. The Claimant is granted permission to incorporate paragraphs 3, 4, 4.1 and 4.2 of the 14 April 2023 PH order in her Grounds of Claim.
32. The first mention of a claim of failure to make reasonable adjustments was at the preliminary hearing on 8 February 2023. That potential claim was then expanded upon at paragraphs 7 to 9 of the 14 April 2023 PH order. Not only had no particulars of that claim been provided before the preliminary hearing on 8 February 2023, neither in the claim form nor in the Grounds of Claim did the Claimant even identify a failure to make reasonable adjustments as a cause of action. The Claimant is refused permission to incorporate paragraphs 7 to 9 of the 14 April 2023 PH order in her Grounds of Claim.
33. Reference is made to paragraph 14 above. In the light of the matters referred to at paragraph 14 above the only aspect of the potential claim of discrimination arising from disability I need to consider for the purposes of the Claimant's application to amend is paragraph 10.5 of the 14 April 2023 PH order (excluding the words "ADHD and") and the following paragraph of the 14 April 2023 PH order, which has been numbered erroneously as paragraph 10. The Claimant is refused permission to incorporate paragraph 10.5 of the 14 April 2023 PH order (excluding the words "ADHD and") and the following paragraph of the 14 April 2023 PH order, which has been numbered erroneously as paragraph 10.
34. A claim of discrimination on the grounds of being non-binary was not even intimated by the Claimant until the preliminary hearing on 14 April 2023. As stated above, at that hearing she sought to substitute that claim for the previously articulated claim of discrimination on the grounds of a perception that she was transgender. The first intimation of a claim of discrimination on the grounds of a perception that the Claimant was transgender was made at the preliminary hearing on 8 February 2023. Alleged discrimination on the grounds of being non-binary did not even feature in the claim form or the Grounds of Claim as a heading. The Claimant is refused permission to incorporate paragraphs 11 and 11.1 to 11.6 of the 14 April 2023 PH order in her Grounds of Claim.
35. Discrimination on the grounds of sexual orientation was mentioned as a heading in the Grounds of Claim. No details of any such alleged claim were provided by the Claimant at the preliminary hearing on 8 February 2023. The first details provided of that alleged claim were provided at the preliminary hearing on 14 April 2023 and are set out at paragraphs 12, and 12.1 to 12.5 of the 14 April 2023 PH order. The Claimant is refused permission to incorporate paragraphs 12, and 12.1 to 12.5 of the 14 April 2023 PH order in her Grounds of Claim.
36. Victimisation was mentioned as a heading in the Grounds of Claim. No details of any such alleged claim were provided by the Claimant at the preliminary hearing on 8 February 2023. The first details provided of that alleged claim were provided at the preliminary hearing on 14 April 2023 and are set out at paragraphs 13, and 13.1 and 13.2 of the 14 April 2023 PH order. Not until the preliminary hearing of 14 April 2023 did the Claimant specify what was the protected act she relied upon for the purposes of her victimisation claim. The Claimant is refused permission to

incorporate paragraphs 13, 13.1 and 13.2 of the 14 April 2023 PH order in her Grounds of Claim.

37. The Claimant is granted permission to incorporate paragraph 14 of the 14 April 2023 PH order in her grounds of claim. This relates to her claims of non-payment of holiday pay/sick pay. This is sufficiently closely connected with the particulars set out at paragraphs 5 to 8 of the Grounds of Claim, albeit the heading to paragraph 5 to 8 of the grounds of claim is "Breach of Contract". In so far as is necessary, the claimant is given permission to pursue this claim as a claim of breach of contract or unlawful deductions as she sees fit.

Employment Judge Gilroy KC

Date: 20 November 2023