EMPLOYMENT TRIBUNALS

Claimant: L

Respondent: Paul Steele Ltd

Heard at: Bristol

On: 03 November 2023

Before: Employment Judge Housego

Representation

Claimant: in person

Respondent: Neil Gouldson, of Avensure Ltd

JUDGMENT

1. No part of the claim is struck out.
2. Leave to amend is given.
3. A telephone case management hearing will be listed as soon as possible to progress the claims towards a hearing.
4. The table appended to the Case Management Order of 27 June 2023 is to be treated as a list of issues to be heard by the Tribunal.
5. Directions are given in paragraphs 37 and 38.
6. An anonymity direction is made for the Claimant.

REASONS

1. At a Case Management Hearing on 27 June 2023 I ordered a preliminary hearing to decide two things:

   1.1. First whether any part of the Claimant's claim was filed out of time, if so to decide whether it is just and equitable to extend time, and;

   1.2. to consider amendment if necessary to accommodate the claim as asked by the Claimant in an email of 18 May 2023 and as I set it out in the Case

Management Order after discussing the case with the Claimant in that hearing.

2. I set out the Claimant's claim, as I understood it at the Case Management Hearing, in my Case Management Order. The Claimant confirmed that save for one small matter which she raised in an email to the Tribunal I set it out correctly. I have not seen that email, but with that caveat I record that this is her case.

3. The amendment application arises from an email sent by her to the Tribunal on 18 May 2023:

> *"I need to add the claims for physical and non-physical harassment. Both of these claims are supported in the formal grievance process between myself and Paul Steele's.*
>
> *Sex discrimination for when my son's illness was put on a very negative performance review. Again, this was added into the formal grievance process."*

4. As pleaded, there is currently no sex discrimination claim.

5. The Respondent set matters out thus.

   5.1. On 18 July 2022 the Claimant told the Respondent that she was pregnant.

   5.2. Her employment ended on 11 October 2022, following a resignation on 04 October 2022.

   5.3. The Acas period was 04 October 2022 to 04 November 2022.

   5.4. The claim form was filed on 04 November 2022.

   5.5. On 18 May 2023 the Claimant emailed the Tribunal:

> *"I need to add the claims for physical and non-physical harassment. Both of these claims are supported in the formal grievance process between myself and Paul Steele's.*
>
> *Sex discrimination for when my time off for my son's illness was put on a very negative performance review. Again, this was added into the formal grievance process."*

   5.6. The claim was issued on the day the Acas certificate was issued. That "stops the clock". Counting back 3 months from 04 October 2022 means that anything before 05 July 2022 is out of time. It was accepted that the public interest disclosure claims were not out of time.

   5.7. The Respondent did not object to the clarification of the public interest disclosure claim set out in my earlier Case Management Order and accepted that the public interest disclosure claim was in time.

6. In so far as amendment to include other claims is concerned, Mr Goulsdon

submitted that the *Selkent*[1] principles had to be read in the light of Reuters Ltd v Cole [2018] UKEAT 0258_17_1602. The *Reuters* case made it clear that the degree of difference in the factual area of enquiry is relevant. In the *Reuters* case it was that section 13 involves a more onerous test than section 15, and thus a more demanding factual enquiry, and the judgment was overturned (and it was remitted to the same judge to determine on another basis). It was submitted that the legal test for the new claims was different to the existing claims and that this fell within paragraphs 27 and 28 of *Reuters*:

> *"27 First, I do not accept that the authorities establish that a mere relabelling exercise extends beyond a new claim based on facts which are already pleaded.*
>
> *28 Secondly, I consider that the section 13 claim does involve a greater area of factual enquiry and thus takes it outside the relabelling category. Thus:*
>
> > *(1) section 13 involves a more onerous test than section 15, and thus a more demanding factual enquiry. The set of facts which is necessary and sufficient to establish liability under section 15 will not be sufficient to satisfy section 13.*
> >
> > *(2) the existing claim has been framed to establish the ingredients of a section 15 claim not a section 13 claim. Thus, it does not contend, expressly or by implication, that Mr Cole suffered direct discrimination by Mr Foley or otherwise, because of his disability.*
> >
> > *(3) to the extent that inferences can be drawn which establish the further ingredients of a section 13 claim, they are inferences of new fact."*

7. There is, as I set out in the Case Management Order, a technical point: that the S26 and S13 (harassment and direct discrimination) do not apply to pregnancy and maternity discrimination. Mr Goulsdon points out that this is a jurisdictional issue, and that to bring such claims the Claimant must apply to admit a new claim, and he submits it cannot be a relabelling of the existing pregnancy discrimination claim.

8. I note the conclusion in the *Reuters* case was that the application was to be treated on the basis that it involved a new claim, rather than being a simple case of relabelling[2]. The submission of Mr Gouldson is not that the application must fail, but that *Reuters* requires either that the *Selkent* tests have a higher threshold in such circumstances or that this is not relabelling at all, but an application to admit a wholly new claim of sex discrimination.

9. Mr Goulsdon submitted that the tests for the new claims of sex discrimination harassment are different to that for the pregnancy discrimination, and that meant it was not relabelling but an application 6 months out of time to add a new claim.

[1] Selkent Bus Co . Limited v Moore [1996] ICR 836
[2] Paragraph 34

10. He also submitted that while there is reference to her son's illness in the Claimant's narrative the claim of sex discrimination arising from that illness is a claim that is wholly different to the gravamen of the claims as pleaded.

11. The claim is well structured in terms of the law, and so this was not an accidental oversight, but a clear formulation of the claims she wished to bring.

12. While one could not but have sympathy for the circumstances of the Claimant, she had almost a month after deciding to bring a claim (on 04 October 2022) to prepare the claim before suffering the miscarriage, and would have been expected to do so, so that the misfortune of the miscarriage was not as relevant as the Claimant said in assessing the way the claim was pleaded.

13. Mr Gouldson submitted that the claim was filed on 04 November 2022, and the application was made on 18 May 2023, over 6 months later. There was nothing, he submitted, to warrant a successful application to amend now. There was no change in circumstances or the discovery of new information.

14. What had occurred, Mr Goulsdon submitted, was that the Claimant had, in May 2023, belatedly sought advice from the employment team at the firm she had once worked at, and the lawyer who she had consulted had in effect re pleaded her claim for her.

15. For an indirect sex discrimination claim the Claimant would need to plead a comparator and to set out a provision criterion or practice – absence policy – and that applying it was not a proportionate means of achieving a legitimate aim. This was not relabelling but a wholly new claim, and it was very late.

16. The Claimant was clued up – she had also made a subject access request – and had taken advice and put together a coherent claim so there was no reason to allow her to re write it many months later.

17. And so:

    17.1. is there a different legal test to the sex discrimination claim sought to be added and does that mean the application should be refused?
    17.2. Or is this to add new labels to facts already pleaded?
    17.3. Or does this application involve new claims based on facts not already pleaded? And
    17.4. after six months is it now too late to amend?

18. The claim form claims pregnancy discrimination and public interest disclosure detriment.

19. The claim is not currently coded as an unfair dismissal case, but in the box 8.2 the Claimant heads her narrative "Whistleblowing" and after setting out discrimination allegations sets out that she resigned.

20. I add a claim of unfair dismissal under S103A of the Employment Rights Act 1996 of my own volition – this is no more than to attach a label to the facts alleged. The Claimant already has a claim under S47B[3] of the Employment

[3] 47B Protected disclosures.

Rights Act 1996. The detriments alleged are being made subject to an unfair probation review and overall hostility in the workplace. This would appear to overlap with the discrimination claim, as the Claimant asserts that both matters were the reasons she says she was targeted by the Respondent. The claim ends with the Claimant's resignation, which was plainly because of her allegations of sex discrimination and of public interest disclosure. A claim for automatically unfair constructive dismissal is implicit in this narrative.

21. I record that this occurred to me only while drafting this judgment, and it is open to the Respondent to seek a reconsideration of this judgment.

22. First, Mr Goulsdon is right in his submission that the test for a claim of unlawful discrimination harassment is different to that for other claims of discrimination[4]. I accept his submission that the direct sex discrimination and harassment claims are not a relabelling exercise (*pace Selkent)* but require applications to add a new head of claim, albeit that the claims are based on assertions set out in the claim form, and in the Claimant's grievance while she was employed.

23. The claim of sex discrimination based on her son's sickness absence does not have a different legal test, and while that absence is referred to in the claim form, the thrust of that claim form is pregnancy discrimination and public interest disclosure detriment. I consider that this too is a wholly new claim, again one based on an assertion set out in the claim form.

24. I accept the Claimant's evidence to me (about her personal circumstances and what happened about her claim) in its entirety, save for one point.

25. Her pregnancy was not planned. It is not in dispute that the relationship between the Claimant and her employer after she told them of her pregnancy on 18 July 2022 was not harmonious. She resigned on 04 October 2022 and says it was as a result of the way the Respondent acted. On 04 October 2022 she intended to bring this claim – she started the Acas early conciliation process on that date. Her employment ended on 11 October 2022. On 31 October 2022, before that period expired and the early conciliation certificate was issued (on 04 November 2022) the Claimant suffered a miscarriage and lost her baby. It is likely that she had prepared her claim form before that, as she submitted it immediately the Acas early conciliation certificate arrived.

26. The Claimant had done some research and spoken to Acas about her claim. She formulated a claim which is based on the relevant legislation. She did not cram the boxes in the online form with text for presentational reasons. There was space in box 8.1 which she did not use, nor the space in 9.2 (which relates to remedy, but which could have been utilised). She used box 15 for further information, but not fully.

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(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

[4] Set out fully in Bakkali v. Greater Manchester Buses (South) Ltd (t/a Stage Coach Manchester) (HARASSMENT - Religion Or Belief Discrimination) [2018] UKEAT 0176_17_1005: The test for harassment under s.26 Equality Act 2010 is different to the test for direct discrimination under s.13. The s.13 test is a comparative exercise and requires an inquiry into the cause of the less favourable treatment: "*because of a protected characteristic*" (emphasis added). In contrast, the test at s.26 does not require a comparison and is a wider test: "*related to a relevant protected characteristic*".

27. The one point that I do not accept is that the 'paper apart' option was not apparent to her and that was the reason she did not set out matters more fully. I do not doubt that the Claimant was unaware of the 'paper apart' option, but do not think that was the reason she did not set out more text. She could have filled box 15 and ended 'run out of space' if she wished to put more but could not find a way to do so.

28. It is a very important factor that the Claimant was not represented by anyone and submitted the claim herself online and did so only 4 days after her miscarriage. I accept fully the Claimant's evidence of the devastating effect on her of her miscarriage. This came on top of what she saw as the collapse of her ambition to qualify into an accountancy profession.

29. The Claimant's mental health entered a severe decline. This has been ongoing. The Claimant's life experience since leaving the Respondent is exceptionally hard.

30. On 12 (or 16) November 2022 she consulted the advice line of the firm of solicitors at which she had once worked (in the accounts team, not in a legal capacity), but this was at a time when she was deeply distressed and it did not result in her applying to amend or take any other action. This is understandable.

31. The Claimant's oral evidence, supported by letters from her GP and the community mental health team, and which I accept, is that by January 2023 she was in a state of mental numbness and disassociation, trying to focus on caring for her three children. She then started suffering panic attacks. Ultimately her mental health deteriorated to the extent that she, a single parent, was unable to care for her children, and they went to live with their paternal grandparents, her own parents and the children's father being deceased.

32. Unfortunately, the children's grandparents were not well disposed towards her and told her children that they were having to live with them because their mother (the Claimant) did not love them, and this caused estrangement between her and her children which added to her mental health problems.

33. Then the grandparents ceased to care properly for her children and they were taken into care. Her mental health declined further.

34. By May 2023 with the support of her community mental health team she steeled her herself to seek advice and did so, hence her email to the Tribunal of 18 May 2023.

35. Her circumstances have not improved since, for she became suicidal as the birthday of her son approached and she would not be there for it, and she was in hospital as an informal patient in October 2023, and was then sectioned for 72 hours.

36. I decide:

    36.1. The applications are in reality applications to amend rather than to attach new labels to existing claims.

    36.2. The allegations and asserted facts underlying or supporting the new

claims are all clearly apparent from both the text in the claim form and in the grievance submitted by the Claimant before she resigned (informal on 18 August 2022 and formal on 21 August 2022).

36.3. The Claimant has personal reasons of great magnitude which explain the delay in making the application.

36.4. The Respondent is not disadvantaged by the delay because everything of which the Claimant complains is readily apparent from the grievance and the existing claim form.

36.5. It is just and equitable to allow the amendment in all these circumstances – the reasons given by the Claimant are compelling, and there is little or no prejudice to the Respondent other than having more claims to defend arising from the same factual matrix.

36.6. In particular the period of six months does not cause the Respondent prejudice in defending the claim. The progress of claims is unfortunately slow at present due to the weight of claims in the system. There is little or no delay caused by these amendments.

36.7. In so far as any discrimination claim may be out of time it is clear to me that all the claims are part of a sequence commencing on 18 July 2018, which is after the cut of date of 05 July 2022 (I record that I neglected to ask Mr Gouldson to set out the last date for claims, and this date is my calculation of it. It is not clear, if that is right, what claim is out of time.)

36.8. If any discrimination claim is out of time it would be just and equitable to extend time (it is not suggested that the public interest disclosure claim is out of time). The Claimant resigned and applied for her Acas early conciliation certificate the day she submitted her resignation and issued the claim the day the certificate was issued. That is as prompt as it is possible to be. In the context of an ongoing employment relationship until 04 or 11 October 2022 it would not be just and equitable to take a time point against the Claimant in these circumstances.

37. I permit the Respondent to enter a new Grounds of Resistance to deal with the claims as are set out in my last Case Management Order (with the amendment set out by the Claimant in an email to the Tribunal). They are to do so within 28 days of receiving this judgment.

38. If the Respondent considers that it needs further and better particulars of the claims it must say so, in detail, within 14 days of receiving this judgment, requesting more time to submit new Grounds of Resistance.

39. I decided that the personal circumstances of the Claimant are such that of my own volition I make an order under Rule 50(1)[5] to anonymise the Claimant for

[5] Privacy and restrictions on disclosure
50.—(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

the purposes of this judgment. Those circumstances are relevant to my decision but may not be for the substantive issues in the case. That will be a matter for the Tribunal hearing the case. While transparency in proceedings – open justice - is very important, I decide that it would not be proportionate to infringe the Claimant's Article 8 right to a private life by the publicity inherent in a publicly available judgment which would appear in any internet search against the Claimant's name, without limit in time. Of course, a search against the Respondent's name subsequent to a final hearing would reveal the Claimant's name and also this judgment, so to avoid jigsaw identification it may be that the final hearing should also be anonymised. That will be a matter for the Tribunal hearing the case.

Employment Judge Housego
Date 09 November 2023

Judgment & Reasons sent to the Parties:
01 December 2023

FOR THE TRIBUNAL OFFICE