Case Number: 1304751/2023

EMPLOYMENT TRIBUNALS

Claimant: Mrs S Henson

Respondent: AMG Consultancy Services Ltd

Heard at: Birmingham (by CVP) **On:** 12 December 2023

Before: Employment Judge Maxwell

Appearances
For the claimant: Mr Mortin, Counsel
For the respondent: Mrs Islam, Solicitor

JUDGMENT

1. The Claimant's claims are not struck out.

2. The Claimant's claims are not subject to a deposit order.

3. The Claimant has permission to amend as set out below.

REASONS

Preliminary Issues

1. This preliminary hearing was listed to determine:

   1.1 are all of the complaints set out in the claimant's further and better particulars of claim made in her claim form?

   1.2 if not, should she be given permission to amend so that she can pursue those complaints?

   1.3 does any part of the claim have no reasonable prospects of success, and if so should it be struck out pursuant to rule 37 of the Rules of Procedure?

   1.4 does any part of the claim have little reasonable prospects of success (whether because of time limits or anything else), and if so should one or more deposit orders be made in accordance with rule 39 (and if so how much for; up to £1,000 per order)? The claimant's financial means and ability to pay are relevant to this issue;

1.5 case management.

Background

Claim

2. The Claimant contacted ACAS on 20 June 2023 and a certificate was issued on 22 June 2023. She presented a claim on 26 June 2023. This included a start date of 12 September 2022 and stated her employment was continuing. The Claimant said she was a Care Assessment Officer. At box 8.1, she ticked the unfair dismissal and disability discrimination. At box 8.2, the following narrative was provided:

> **I approached one of the directors in May to raise a grievance.**
>
> **We held the meeting and he stated he needed to investigate whether or not I had been discriminated against.**
>
> **I gave numerous amounts of scenarios and evidence to support the claim. The majority of the evidence and statement were dismissed. Two of the witnesses were off with sickness. I had evidence that they were off sick due to the same unwanted behaviour from the same manager.**
>
> **The company have tried to dismiss all complaints regarding this manager as non founded, or lack of evidence.**
>
> **I appealed the decision of the grievance outcome and the managing director stated he spoke to one of the witnesses who returned to work. He claimed the evidence was still unfounded and the witness did not agree. That same witness had spoken with me in writing about the ongoings of my discrimination and the workplace.**
>
> **Now, with less than a days warning, I have been removed from my normal working office and my role has had changes which I had no choice but to agree to. They have claimed this is because of my disability. It is not. They are now trying to keep me out of my contracted role within my contracted branch. The operational reasons given are unfounded as they have been an ongoing issue before my time with the company.**
>
> **The manager described has not had any repercussion to the grievance, even during the grievance they did not follow the ACAS standards. Even when I expressed that I was still being tormented within my branch, the company did nothing for weeks to alleviate this.**
>
> **I'm not the only person they have done this to. Now I feel they are trying to make me leave too. I had originally put constructive dismissal in my grievance and accepted the outcome around that manager. However, now I feel that this is relevant again due to the changes in my role with such short notice. Due to my disability I was not given time to consider the impact of the changes etc and now it has become more detrimental.**

Response

3. The Respondent presented grounds of resistance defending the claim. This included a jurisdictional defence, namely that the Claimant had not been dismissed at the time of presenting her claim, albeit she had resigned during the

intervening period. The Respondent recited a background of the Claimant raising a grievance, which was not upheld. Also, it was said that although she remained based at the Respondent's Wolverhampton branch, she had been asked to assist, temporarily, with clearing a backlog at other locations.

4. On 28 July 2023, the Respondent applied for strike out and / or deposit orders. The Tribunal said to lack jurisdiction for the Claimant's unfair dismissal claim. Her discrimination claims were said to be unparticularised and without merit.

Further and Better Particulars

5. By an email of 7 August 2023, solicitors for the Claimant opposed strike out and provided what it said were further and better particulars ("F&BPs") of the claim. These included the Claimant suffering with "bipolar" and her line manager saying she was "so bipolar" despite having been asked to stop. She raised a grievance, which was dismissed. Following this, a manager wrote saying:

> **"concerned about some issues that you and your husband had raised about your mental health and that I believe the best solution would be for you to undertake care assessments for the Burton/Crewe branches in Wolverhampton and Cannock"**

6. The F&BPs included a harassment claim with respect to the "so bipolar" comment and complained of victimisation following her grievance. There was a protected disclosure claim, relying upon the same grievance. The alleged detriments for both the victimisation and protected disclosure claims were:

> **a. On 31.05.23, the Respondent informed the Claimant she would be required to work in the Burton and Crewe branch, which the Claimant submits to be disingenuous.**
>
> **b. On 31.05.23, Rachel Simpson, Director, changed the Claimant's role, with less than 24 hours' notice, namely she would no longer oversee the Wolverhampton Branch and to undertake non-complex care assessments.**
>
> **c. On 30.05.23, dismissing the Claimant's grievance in the absence of speaking to two key witnesses.**
>
> **d. On 20.07.23, the Rachel Simpson informed the Claimant that she will need to be reviewed every week until the expiration of her notice period**

7. Automatic unfair dismissal for having made a protected disclosure was also pursued. The dismissal was said to be constructive when she resigned on 20 July 2023 as a result of the detriments set out above.

Law

Amendment

8. In **Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] UKEAT/151/96** the EAT provided helpful guidance on the consideration of applications to amend, per Mummery J:

> **(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:**
>
> **(a) <u>The nature of the amendment</u>**
>
> **Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.**
>
> **(b) <u>The applicability of time limits</u>**
>
> **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 is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions eg, in the case of unfair dismissal, S.67 of the 1978 Act.**
>
> **(c) <u>The timing and manner of the application</u>**
>
> **An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. 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. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.**

9. Whilst the **Selkent** factors will often be highly relevant to whether an amendment application is granted or not, this will not always be so. The determination of permission to amend is not a tick-box exercise; see **Abercrombie v Aga Rangemaster Ltd [2014] ICR 209 CA** . Notably, even when an amendment would involve adding an out of time claim, this will not necessarily be decisive agent allowing the same; see **Transport and General Workers Union v Safeway Stores Ltd (2007) UKEAT/0092/07**. Ultimately, the interests of justice require a balancing exercise.

10. The body of case law which has developed in connection with amendment applications was recently considered by the EAT in **Vaughan v Modality Partnership [2021] IRLR 97**, per HHJ Tayler:

> **20. In Abercrombie Underhill LJ went on to state this important consideration, at para [48]:**

‘Consistently with that way of putting it, 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 enquiry 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.’

21. 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 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.

22. Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. 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.

[…]

24. It is also important to consider the Selkent factors in the context of the balance of justice. For example:

24.1. A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.

24.2. An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

> **24.3. A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.**
>
> **25. No one factor is likely to be decisive. The balance of justice is always key.**
>
> **26. Rather like Charles Darwin who, when pondering matrimony, wrote out the pros and cons, there is something to be said for a list. It may be helpful, metaphorically at least, to note any injustice that will be caused by allowing the amendment in one column and by refusing it in the other. A balancing exercise always requires express consideration of both sides of the ledger, both quantitively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.**
>
> **27. Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.**
>
> **28. An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice.**

Strike Out

11. Rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 provides:

> **(1) At any stage of the proceedings, either on its own initiative or on the application of a party a Tribunal may strike out all or any part of a claim or response on any of the following grounds-**
>
> > **(a) that it is scandalous or vexatious or has no reasonable prospect of success[…].**

12. The test of "no reasonable prospect of success" was considered in **North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 CA**, per Maurice Kay LJ:

> **4. To state the obvious, an employment tribunal should be alert to provide protection in the face of an application that has little or no reasonable prospect of success but it must also exercise appropriate caution before making an order that will prevent an employee from proceeding to trial in a case which on the face of the papers involves serious and sensitive issues.**
>
> **26. […] what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success. […]**
>
> **29. […] It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and**

> **inexplicably inconsistent with the undisputed contemporaneous documentation.[…]**

13. When assessing prospect of success, the Claimant's case should be taken at its highest; see **Ukegheson v Haringey London Borough Council [2015] ICR 1285 EAT**.

14. The greatest caution should be exercised before striking out discrimination cases as having no reasonable prospect of success; see **Anyanwu v South Bank Students' Union [2001] IRLR 305 HL** per Lord Steyn:

> **24. In the result this is now the fourth occasion on which the preliminary question of the legal sustainability of the appellants' claim against the university is being considered. For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university.**

15. There is, however, no prohibition on strike-out in discrimination cases; see **Ahir v British Airways PLC [2017] EWCA Civ 1392**, per Underhill LJ:

> **8. […] Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be '*little* reasonable prospect of success'**

Deposit Order

16. Rule 39(1) provides:

> **Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.**

17. In **Van Rensburg v Royal Borough of Kingston upon Thames [2007] UKEAT/0096/07**, Elias P addressed the lesser threshold of "little reasonable prospect of success":

> **26. Ezsias then demonstrates that disputes over matters of fact, including a provisional assessment of credibility, can in an exceptional case be taken into consideration even when a strike out is considered pursuant to rule 18(7). It would be very surprising if the power of the Tribunal to order the very much more limited sanction of a small deposit did not allow for a similar assessment, particularly since in each case the tribunal is assessing the prospects of success, albeit to different standards.**
>
> **27. Moreover, the test of little prospect of success in rule 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success found in rule 18(7). It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.**

Argument

18. Both parties had prepared lengthy written submissions and expanded upon those orally.

Conclusion

Original Claim

19. On a fair and nontechnical reading of the Claimant's original claim form, I am satisfied this included the harassment claim and victimisation, insofar as that related to detriments (a), (b) and (c).

20. The Claimant's information at box 8.2 begins with a protected act, namely that she raised a grievance in which she complained of being discriminated against.

21. The discrimination was said to be described in her grievance, which included "numerous accounts of scenarios". Whilst the Claimant did not recite the content of her grievance, she would, reasonably, believe her employer knew what she was referring to and be aware of its content. A copy of the grievance was in the bundle of documents for this preliminary hearing. It is a complaint about the treatment she received at the hands of her manager and includes repeated occasions on which her line manager is alleged to have used the words "so bipolar" with reference to the Claimant or others. Whilst the words "so bipolar" do not appear in the ET1, it was complained of several times in the grievance she cited. To the extent the document prepared by the Claimant's solicitors does now include the words "so bipolar" this amounts to no more than further and better particulars of the existing claim and cannot have come as any surprise to the Respondent.

22. Mr Mortin said the original claim form amounted to a harassment complaint about the comment made by the Claimant's manager and then referred to things which happened thereafter, including her grievance. He contended no link was made between the grievance and subsequent events and, therefore, the Claimant had no victimisation claim. I do not agree. Mrs Islam referred me to the

text at box 8.2. Having set out the rejection of her grievance and appeal, the Claimant went on to say:

> **Now, with less than a days warning, I have been removed from my normal working office and my role has had changes which I had no choice but to agree to. They have claimed this is because of my disability. It is not.**

23. Whilst the Claimant does not say, expressly, the detrimental change in her duties was because of her grievance it is, quite plainly in my view, implied. This implication comes from the sequence, the emphatic wording "Now, with less than a days warning…" and the rejection of the Respondent's purported explanation for giving her different and unwelcome duties.

24. The facts were set out and the Claimant's original form ET1 included both the harassment claim with respect to her line manager's comments and victimisation subsequent to her grievance, with respect to detriments (a), (b) and (c).

25. The same cannot be so for detriment (d) as whilst it is in keeping with the Claimant's general theme, it postdated the claim form and cannot, logically, have been included in box 8.2, however generously that is read.

26. The original claim included an express constructive unfair dismissal claim, said to be occasioned by the behaviour of her manager and the events subsequent to her grievance. This should not, however, have been accepted as the Claimant indicated her employment was then continuing.

27. There was no protected disclosure claim in the form ET1, whether with respect to detriments or dismissal. There was no hint in the Claimant's information at box 8.2 that at the time of raising her grievance, she believed she was doing so in the public interest. The natural reading of her words is that she raised a grievance because she wished the discrimination she was experiencing to stop.

<u>Amendment</u>

28. Accordingly, the Claimant would need permission to amend in order to pursue:

    28.1 protected disclosure detriment claims;

    28.2 automatic unfair dismissal;

    28.3 victimisation or detriment with respect to (d).

29. A protected disclosure detriment or automatic unfair dismissal claim would involve a modest addition to the Claimant's existing claim. It is slightly more than a relabelling as it does involve a new fact, namely the Claimant's subjective belief that at the time of raising her grievance the she believed it was in the public interest. The other aspect of belief is already in the claim form. I am satisfied her belief that her grievance tended to show a matter within 43B(1)(b) was already pleaded, by way of her assertion that her grievance showed she was being discriminated against.

30. As far as unfair dismissal is concerned, this could only be pursued on the basis of ERA section 103A. The Claimant does not have the necessary qualifying service for an ordinary unfair dismissal claim.

31. The Claimant tendered notice by way of an email on 20 July 2023, to expire on 18 August 2023. On this basis and absent further ACAS early conciliation, time for the Claimant to present a free-standing claim in this regard would have expired on 17 November 2023. The Claimant provided her F&BPs on 7 August 2023. Had this included an application to amend in the alternative, no time issue could have arisen. On 9 August 2023, the Respondent wrote saying the F&BPs went beyond the original claim and the Claimant would need permission to amend. On 23 October 2023, EJ Camp listed this preliminary hearing, which expressly included the question of whether the Claimant should have permission to amend. It is unclear whether he construed the F&BPs as involving an implied application to amend or simply assumed the Claimant's solicitors would make a prompt express application to protect their client's position (they did not). Mrs Islam did not clearly articulate an application to amend today, although it was at least implied as she addressed relevant factors, including the proceedings being at an early stage.

32. Separately from the potential impact of limitation periods, the question of amendment arises at very early stage procedurally. No case management orders have been made and nor has a final hearing been listed.

33. The Claimant can be criticised for not (through her solicitors) making a formal application to amend in August. Whilst it is entirely proper for her to provide further and better particulars, it is difficult to understand why this was not accompanied by an application, in the alternative, to amend to the extent necessary if at all. That aside, the proposed amendment to be considered today is in a proper form and was provided to the Tribunal and Respondent at an early stage, when free-standing claims would have been in-time. I do not agree with Mr Mortin's objection that the protected disclosure within the Claimant's grievance has not been sufficiently identified, as I construe this as being limited to the occasions within that document when the Claimant referred to the "so bipolar" comment being used in reference to herself or others.

34. The practical consequences of allowing an amendment will be minimal. The original claim included complaints about the treatment the Claimant received from her line manager and the detriments subsequent to her grievance. This would appear to call for evidence from her line manager and those responsible for the events which followed on from her grievance. This does not change as a result of the Claimant relabelling her protected act as a protected disclosure. Detriment (d) is new but it is the continuation of an existing theme and would seem to add relatively little to the factual enquiry.

35. There will be no meaningful prejudice to the Respondent if it is required to address these claims. The amendment application is being considered at a very early-stage in procedural terms. I am not persuaded the modest factual addition will call for different witnesses. If the Claimant's amendment application were refused, she would face substantial prejudice, in particular with respect to her complaint about dismissal. Without an amendment, the Claimant would have no

complaint about that matter at all, as her unfair dismissal claim if pursued otherwise than under ERA section 103A would have to be struck out.

36. Whilst I have some doubt about the likelihood of the Claimant showing the required public interest belief (both subjectively at the time and reasonably) the position is not so clear cut as would allow me to rule that she had either no or little reasonable prospect of success in this regard. I note that her grievance included complaints about the words “so bipolar” being made in reference to others also and that may suggest it was more than purely personal.

37. The balance of prejudice and interests of justice favour allowing the Claimant’s amendment application.

38. Although I have taken time into account in determining the amendment, I have made no ruling on whether the Claimant’s claims are in time or not and this will be for the Tribunal at a final hearing to determine.

39. Given my view on apparent merits, strike out or deposit orders are not appropriate.

EJ Maxwell

Date: 12 December 2023