EMPLOYMENT TRIBUNALS

Claimant: **Mrs G R Vasiliu**

Respondents: **Amazon UK Services Limited**

JUDGMENT ON A PRELIMINARY HEARING AND DEPOSIT ORDER

Heard at: Birmingham **On: 12 January 2024**

Before: Employment Judge Flood

Representation:

For the Claimant: **In person**

For the Respondent: **Miss Taunton (Counsel)**

Interpreter: Mrs S Bryant

1. The claimant's application to amend her claim to add complaints under ss 44 (1A) (a) and (b) and 100 (1) (d) and (e) Employment Rights Act 1996 ('ERA') is refused.
2. The claimant's claim for automatic unfair dismissal on the grounds of having made a protected disclosure under section 103A ERA has little reasonable prospect of success. The claimant is **ORDERED to pay a deposit of £50** no later than **21** days from the date this Order is sent as a condition of being permitted to continue to advance this complaint.

REASONS

The claim and its background

1. The claimant was employed by the respondent from 7 May 2021 until 26 or possibly 27 March 2022. She was employed under a fixed term contract dated 7 May 2021 (shown at pages 221-234) working as an FC Associate at the respondent's BHX1 ad BHX2 distribution centres which was originally due to terminate on 22 January 2022. The claimant says her contract was extended by a verbal agreement in September 2021 (after which she signed a contract in December 2021) and was due to run until January 2023. She alleges that she was dismissed having made protected disclosures in November and December

2021. The respondent alleges that it extended her original contract until March 2022 and it terminated on the expiry of that extension (because of business consideration and staffing needs).

2. The claimant commenced a period of ACAS early conciliation ('EC') on 14 December 2021 and EC certificate (reference number R201349/21/07) was issued on 17 December 2021 (page 1). A further EC certificate (reference number R201350/21/95) was issued on 19 January 2022 (page 14). A claim was presented on 17 January 2022 (claim number 1300804/2022) (pages 2-13) which was subsequently dismissed upon withdrawal (page 43). The claimant presented a further claim (claim number 1300826/2022) ('Claim 1') on 19 January 2022 (page 15-29). This brought a complaint of disability discrimination and the claimant also ticked the box stating that she wished to bring another type of claim. In the narrative section of that claim form, was included the following:

   "..in November 2021 06 I developed new covid symptoms and I tested positive for the covid, but my employer invited me to cancel the app and ignore the NHS requests and immediately resume work activities. BECAUSE I refused to comply with his requests, he began to lower myself psychologically, changed my pay status and threaten me not to extend my employment contract."

3. The claimant commenced a further period of early conciliation on 21 March 2022 and a further EC certificate (reference R134246/22/09) was issued on 1 May 2022. She then presented a claim form (claim number 1302792/2022) ('Claim 2') on 31 May 2022 (page 45) which brought complaints of unfair dismissal, disability discrimination and also "*another type of claim which the Employment Tribunal can deal with*". This complained that the respondent "fired me because I sued them in court" and that "*they invited me to come covid positive at work (In October 2022) and I refused and my employer began his discriminatory path towards me*". Claim 1 and Claim 2 were subsequently consolidated.

4. A preliminary hearing in private for case management was held before Employment Judge Noons on 9 September 2022 at which attempts were made to clarify the complaints. The case management order sent after this hearing (page 99-108) recorded that the claimant brought complaints of: (a) automatic unfair dismissal by reason of whistleblowing or making a protected disclosure, (b) detriment by reason of whistleblowing or making a protected disclosure and (c) disability discrimination. The case summary recorded was that the claimant's case on the protected disclosure matters were that she was "*badly treated by the respondent because she raised with them that they were in breach of the COVID 19 guidelines in relation to self isolation*". The claimant was ordered to provide further information on the detriments she said she was subjected to and he claim for disability discrimination.

5. There was a further preliminary hearing in public before Employment Judge V Jones on 17 March 2023. Strike out applications made by the respondent (to strike out the claimant's automatic unfair dismissal complaint) and the claimant (to strike out a response) were both dismissed. Judge V Jones also refused an application made by the claimant to amend her claim by adding additional protected disclosures. The respondent's application to strike out part of the disability discrimination claim (about events before 11/13 December 2022) was considered and ultimately those complaints were dismissed with consent. There was further case management discussion at this hearing and the List of Issues

was clarified together with the parties. Judge V Jones recorded in her order (page 144-5):

"Some time was therefore spent at the outset of the hearing obtaining further particulars from the Claimant and revising the list of issues accordingly, A final agreed list of issues is attached to this Order".

A four page document headed "REVISED AGREED LIST OF ISSUES" was attached to that order (page 149-152).

6. A further preliminary hearing in private was held before Employment Judge Harding on 4 July 2023 which was intended to make case management orders and list for final hearing. In advance of that hearing on 28 June 2023 the claimant made an application to amend her claim. This included the following:

"I wish to make the following amendments to my initial claim to better reflect the relevant aspects of the case and highlight the employer's violations and irregularities:

-Addition of a new claim: Neglect of health and safety obligations during work activities"

Judge Harding recorded in her order following this hearing that it was not clear what legal claims the claimant wished to add and there was then a long discussion at the hearing about what claims the claimant wished to add. Having provided the claimant with a copy of section 44 of the ERA during a break the claimant said she wanted to make claims under section 44 (1A) (a) and (b) and also section 100 (1) (d) and (e), acknowledging that neither of those claims was made in the written application. Judge Harding recorded the claim that the claimant wished to make as follows:

"8. The claimant puts these claims in the following way. It is the claimant's case that she refused to attend work, in the alternative took appropriate steps to protect herself or other persons by refusing to attend work, on the following dates; 6 – 16 November 2021, 13 December 2021, 10 and 11 January 2022 and 7 February 2022. It is the claimant's case that she did this in circumstances of danger which she reasonably believed to be serious and imminent, namely that the respondent was requiring workers who had tested positive for Covid 19 to attend work when they should have been isolating.

9. The detriments which the claimant asserts were done on the grounds that the claimant took these steps are:

9.1 Between 7 – 13 November 2021 Christina Petrescu and Iona Mataoanu insisted that the claimant come into work when she was supposed to be isolating.

9.2 On 11 December 2021 Ms Petrescu called the claimant into a disciplinary meeting.

9.3 *Between 13 December 2021 - 9 February 2022 the claimant's manager Sanvir Khunkun instructed the claimant on several occasions to attend work.*

Section 100 ERA

10 On 19 March 2022 the claimant's contract was terminated."

7. As there was insufficient time to deal with this matter, it was listed for a further preliminary hearing in public which was listed for 4 December 2023. On 17 November 2023, the respondent made an application for a deposit order to be made in relation to the claim of automatic unfair dismissal under section 103A ERA. The hearing due to take place on 4 December 2023 was postponed due to lack of judicial resources and relisted for 12 January 2024.

8. This matter therefore came before me to determine: (1) whether to allow the claimant to amend her claim as above, (2) whether to order the claimant to pay a deposit (not exceeding £1,000) if it seems that her section 100 complaint had little reasonable prospect of success. For the purposes of the hearing, I had before me the following documents:

   8.1. Skeleton argument prepared by Miss Taunton on behalf of the respondent;;

   8.2. Bundle of Documents for Preliminary Hearing 4 December 2023 ('Bundle');

   8.3. Bundle of Supplementary Documents ('Supplemental Bundle'); and

   8.4. Bundle of Authorities prove by the respondent ('Authorities Bundle').

9. The claimant had not prepared a written witness statement in advance but I permitted her to give oral evidence by answering some questions put to her by the Tribunal. She was also cross examined by Miss Taunton. As it was 3.15 pm by the time evidence and submissions were completed, I decided to adjourn the hearing for a reserved decision to be made. Some brief case management discussions took place which are the subject of a separate case management order.

The Issues

10. The issues I had to determine were as follows:

    10.1. Whether to permit the claimant to amend her claim to add complaints of under ss 44 (1A) (a) and (b) and 100 (1) (d) and (e) ERA

    10.2. Whether to order the claimant to pay a deposit (not exceeding £1,000) if it seemed that her complaint for automatic unfair dismissal on the grounds of having made a protected disclosure had little reasonable prospect of success.

The relevant law

11. **Rule 29 of First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (amended and reissued on 22 January 2018) ("the ET Rules")** together with due consideration of the overriding objective in **rule 2 of the ET Rules** to deal with the case fairly and

justly, gives the Tribunal power to amend claims and also to refuse such amendments.

12. The Tribunal's power to make a deposit orders and the tests be applied to each application are set out in **Rule 39 (Deposit Orders) of the ET Rules**.

13. The relevant part of **Rule 39** states:

> *"Where a 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."*

14. In relation to the application to amend, the leading authority is **Selkent Bus Co Limited v Moore** [1996] ICR 836, EAT:

"(4) Whenever a 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) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The Nature of the Amendment

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)The Applicability of 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 is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal section 67 of the Employment Protection (Consolidation) Act 1978.

(c) The Timing and The Manner of the Application

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 Regulations of 1993 for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay 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 factors into account the Parliament considerations are relative injustice and hardship involved in refusing or granting an amendment. The question of delay, as a result of adjournment, and additional costs, particularly if they are unlikely to be recovered by the successful party are relevant in reaching a decision."

15. I was also referred to the cases of **Chaudhry v Cerebus Service Security and Monitoring Services Ltd [2022] EAT 172** and **Abercrombie v Aga Rangemaster [2014] ICR 209** which cited Selkent and clarified that n determining the nature of the amendment and whether it amounts to an entirely newcause of action, what matters is the extent to which the factual and legal issues raised by the amendment differ from the existing claim.

16. Miss Taunton also asked the Tribunal to consider the case of **MacFarlane v Commissioner of Police of the Metropolis [2023] EAT 111** firstly for authority for the proposition that there is no rule of law that a claim of automatically unfair dismissal under s.103A ERA 1996 is the same cause of action or same type of legal complaint as an existing complaint of unfair dismissal and also that a Tribunal when considering amendment was entitled to take into account what the party applying had themselves said about the claim at a previous hearing.

17. In relation to strike out applications, guidance been given by the House of Lords in the case of case of **Anyanwu v South Bank Students' Union** [2001] ICR 391, and the Court of Appeal in **Ezsias v North Glamorgan NHS Trust [**2007] ICR 1126, and by Lady Smith in the Employment Appeal Tribunal in **Balls v Downham Market High School and College** [2011] IRLR 217. The former two cases made the point, that in cases of discrimination and whistleblowing respectively, that a strike out on the basis of no reasonable prospect of success should only arise in an exceptional case when central facts are not in dispute. Lady Smith in the Downham Market High School case noted that it was not a question of assessing whether a claim was likely to fail or whether its failure was a possibility but that the claim had no reasonable prospect of success and that the tribunal should assess this from a careful consideration of all the available material. I am required to take the claimant's pleaded case at its reasonable highest and it is not the role of the judge hearing a preliminary hearing to conduct a mini trial on partial evidence. The test under **rule 39** is "less rigorous than under **rule 37** and I am not limited to considering whether the claimant meets the threshold of having set out a prima facie case turning on real factual disputes but may go on to form a view as to whether the claimant is likely to be able to make out their case on the facts (**Van Rensburg v Royal Borough of Kingston-upon-Thames** [2007] All ER (D) 187 (Nov)).

18. I was also referred to the authority of **Hemdan v Ishmail [2017] IRLR 228** and the guidance that the purpose of a deposit order is *"To identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs, ultimately, if the claim fails."* Further reference was made to ***Wright v Nipponkoa Insurance [2014] UKEAT/0113/14*** namely that *"When determining whether to make a deposit order an Employment Tribunal is given a broad discretion. It is not restricted to considering purely legal questions. It is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case."*

Conclusions

THE AMENDMENT APPLICATION

19. The claimant's applications to amend her claim by on 29 June 2023 referred to a wish to *add "…a new claim: Neglect of health and safety obligations during work activities".* In the letter making such application the claimant said such amended was justified because the respondent's actions *"reflect a serious breach of health and safety obligations in the workplace by the employer".* She stated that the

details she wished to add were present in her ET1 form and that the amendments would not *"delay the proceedings or impact the fairness of the procedures"* and would assist the Tribunal in making its decision. During the hearing the claimant told the Tribunal that the reason she had only made the application to amend in June/July this year was that the first two preliminary hearings had been focused on defining the case and she understood from those hearings that health and safety at work matters were not within the jurisdiction of the Employment Tribunal. It was only at the third hearing before Judge Harding that the claimant said she realised she had this type of claim when the time was taken to explain these sorts of claims to her. She submitted that there was reference to health and safety matters in her first claim form (at pages 20 and 21) and had consistently complained about health and safety breaches at all the hearings. The claimant acknowledged that before deciding to bring her claim she had tried to seek assistance from various agencies and had spoken more than once to Citizens Advice (who directed her to contact ACAS to start her claim). She acknowledged that there had been a lengthy discussion about her claim at the hearing before Judge V Jones in March 2023 and that she had read the document headed "Revised Agreed List of Issues" attached to the order sent out after that hearing. She submitted that at previous hearings it had not always been clear and that she was suffering from health issues which led her to become anxious and confused during the hearings. The claimant summarised the complaints she wanted to bring by stating that the respondent had put pressure on her and had not respected her period of sickness or respected her isolation period which had an effect on her wellbeing. She submitted that section 44 ERA was there to protect a worker who needed to be absent form their place of work in a situation of serious and imminent danger.

20. The respondent resisted the application to amend firstly because this was a significant amendment to the claim when the Tribunal focused on the substance of the claim not just its legal form. It referred to the **Macfarlane** case above and suggested that the Tribunal should place weight on the clarifications given by the claimant at two earlier lengthy case management hearings where it was made clear by the claimant what claims were being made (which did not include the claims currently sought). It makes the point that the claims now sought to be added are out of time with the addition of the section 100(1) ERA complaint being sought some 15 months after the effective date of termination of employment and the complaints of detriment under section 44 being even longer out of time. It directs the Tribunal to the provisions of section 48(3) ERA and 112 (2) ERA which provide that complaints must be brought within 3 months unless a claimant can show it is "*not reasonably practicable*" for the claims to have been brought in time. It further submits that the claimant has not given any satisfactory explanation why they were not brought in time. The respondent also alleges that the manner of the application (made more than a year after the presentation of claims) and after two lengthy case management hearings were claims were clarified is unreasonable and causes prejudice as the respondent is required to keep responding to a claim on "*constantly shifting ground*".

21. In deciding the application I considered the factors identified by Selkent before addressing the balance of prejudice and hardship. I set out the analysis below:

Nature of the amendment

22. The amendment requested here is a substantial one. The claim currently before the Tribunal is one of unlawful detriment and unfair dismissal on the grounds of

having made a protected disclosure, with the claimant relying on disclosures made to the respondent's head office in late 2021 about its isolation practices. The detriments relied upon relate to matters that took place at work in relation to her role and the actions of principally her line manager. The amendment relates to an allegation that because she refused to attend work when she had Covid 19, that she was subjected to different detriments by the respondent's local HR representatives. Although there is cross over in terms of the time periods and types of legal complaint, these are factually distinct claims involving in some cases different individuals. I also take note of the guidance provided in the Macfarlane case above and it is clear that the claimant was given very many opportunities at the three hearings that have already taken place to explain what sort of claim she wanted to bring. Even is she was unaware of the precise legal provisions she wanted to rely on, the facts behind such complaints were not set out as they are now by the claimant either in her claim form or during the first two hearings. In the claim form the reference to health and safety is really an allegation about various breaches by the respondent of its obligations to provide a safe place of work to its employees (which indeed are not claims the Tribunal can determine).

Applicability of time limits

23. Clearly were a new claim form to be submitted now on these matters, it would be on its face well out of time. The claimant explains the delay by her lack of understanding of her complaints and these only becoming clear when Judge Harding made reference to section 44 and 100 (1) at the last preliminary hearing in July 2023. Whilst I full appreciate that the claimant is a litigant in person and these are complex complaints, the claimant had been given considerable time and space to explain the claims she wanted to bring and have these clarified and recorded from very early on in the proceedings. The claimant had some advice from Citizen's Advice and at the very least could have set out the facts behind the claim she now seeks to bring at a much earlier stage. I was not satisfied that the reference to health and safety that was made in the claim form above is sufficient to suggest or indicate that a claim of the nature now sought was what was intended at the time. It is an entirely different and new claim.

Timing and manner of the application

24. The application to amend was really only finally clarified at the hearing in July 2023. This is over 18 months after the claim form was originally presented. There were two preliminary hearings already held by this stage at which any applications to amend could have been made (and indeed the claimant had already made applications to amend). The claimant now seeks to add a new type of complaint. I was not satisfied by the claimant's explanations as to why this was not raised earlier even if not in the precise legal context, by way of a complaint about the facts now sought to be relied upon

Balance of prejudice

25. Putting these factors together I concluded that the balance of prejudice and hardship favours refusing the amendment. This is a new and factually distinct complaint raised substantially after the primary limitation period. The respondent will inevitably be significantly prejudiced in addressing the complaint as it now appears to be put as to do so would require additional work that would be burdensome and costly. Additional evidence is likely to be require. The claimant has had ample opportunity to set out what her claim is and make any

applications to amend at a much earlier stage in the case. The relative prejudice to the claimant if the application is not granted is proportionally less than the disadvantage to the respondents if it were. She already had significant claims in play which are now getting close to being heard. The effect on these already elongated proceedings would be significant and it would not be in the interests of justice or the overriding objective to expand the claim further.

26. For the above reasons, the claimant's application to amend is refused.

THE /DEPOSIT ORDER APPLICATION

27. The respondent then made an application for a deposit order to be made in respect of the claimant's complaint that she was automatically unfairly dismissed on the grounds of having made a protected disclosure (section 103A ERA) because it says it has little reasonable prospect of succeeding. It submits that for this claim to succeed the claimant will need to establish that at the time of her dismissal in March 2022, the contract that she was working under had been extended by the respondent until 2023. It submits that the claimant has no real prospect of establishing this because there is no documentary evidence at all to support this position and the text message the claimant relies upon which refers to an extension does not have an end date (see page 248). It submits that it was inherently unlikely that such an extension would ever have been agreed given what it says is the respondent's policy to restrict its fixed term contract terms to 18 months (relying on an excel workbook drawn from its systems recording its fixed term employees' "*18 Month Date*" including the claimant's being recorded at 16 November 2022 – see page 270). It further submits that the claim is weak given that the claimant's own manager (against whom the bulk of the detriment complaints are made) in fact extended her contract until 19 March 2022 **after** the claimant had made her alleged public interest disclosures (see page 268). The respondent contends that its position that the claimant's contract was extended in January 2022 until March 2022 is in contrast supported by documentary evidence (page 268 and 281-3). It also submits that it has strong evidence supporting the actual reason why the claimant's contract was not further extended (page 270).

28. The claimant submitted that although she may have been sent e mails regarding a contract extension in January 2022 that she never signed the contract issued at this time. She submits that it was not possible for the respondent to have extended her fixed term contract in January 2022 as she did not provide her consent. She alleged that upon starting work with the respondent she was required to sign a confidentiality agreement (referred to at page 221) and this was also not signed again by her in January 2022 (and thus she cannot have been working under such a contract). The claimant pointed to a number of documents in the Bundle which she says support her position that she was to remain employed until 2023. In particular at page 254 there was a letter sent to her on 26 March 2022 which stated "*we expect you to return to work on (DD/MM): 27/03*" which she says is after her employment was allegedly ended. She also points to printouts of a timetable that she downloaded from the respondent's systems before she left employment which indicated that she had shifts allocated in April to October 2022 (pages 256 to 262). She also points out that when she finished her last shift (a night shift starting on the evening of 26 March and finishing the morning of 27 March 2022), she was able to log out and clock out of the systems, so must still have been recorded as an employee.

29. In relation to the application for a deposit order, I have applied the guidance set out in **Van Rensburg** above. Determining whether a claim has little prospect of success is a less rigorous test than showing it has no reasonable prospect of success. On this basis, I doubt that the claimant will be able to establish the factual and legal matters required of her in relation to this claim. I have listened carefully to what she said and looked at the documents she would rely on referred to above. However I accepted the submission of the respondent that in relation to the confidentiality agreement point, the existing agreement signed at the start of her employment would remain in place irrespective of extensions. No new agreement for confidentiality would ever have been required. The extension letter that was sent to the claimant on 13 Janaury 2022 (which she did not sign) clearly states that all other terms and conditions remain in place (page 268). I am also of the view that the documents the claimant directed me to in terms of calendars had no status as indicator of the contractual position. The e mail sent to the claimant on 26 March was clearly an autogenerated e mail and does not appear to be to shed any light on whether the claimant was to remain employed until 2023. The glaring absence of any documentary evidence which supports that the claimant was offered and signed a contract extension in December 2021 extending her employment until 2023 is significant and is a significant weakness in the claimant's case. I therefore conclude that her claim that the respondent has unfairly dismissed the claimant on the grounds of having made a protected disclosure has little reasonable prospect of success and therefore it is appropriate for me to order the claimant to pay a deposit not exceeding £1,000 as a condition of being able to continue to advance this claim.

30. I have considered the level of such a deposit and am aware that I must make reasonable enquiries into the ability of the party to pay the deposit and have regard to any such information when deciding the amount of the deposit. The claimant gave evidence about her financial position at the hearing and I was satisfied that the claimant has very little disposable income remaining (if any) after she has paid the outgoings required to support her and her family. She relies on ad hoc support from family members and has no savings.

31. I considered in light of the above, and the submissions made on this at the hearing itself, that the appropriate level of deposit is at the level of £50. The claimant is therefore **ORDERED** to pay a deposit of **£50,** if she wishes to pursue this complaint of automatic unfair dismissal on the grounds of having made a protected disclosure (section 103A ERA)**.**

Employment Judge Flood

26 January 2024