



EMPLOYMENT TRIBUNALS

Claimant: Mrs H Chisholm

Respondent: Rockline Industries Limited

Heard at: Midlands West Employment
Tribunal (by CVP)

On: 19 December 2023

Before: Employment Judge C L Taylor

REPRESENTATION:

Claimant: In person

Respondent: Mr Higgett, Counsel

A decision having been sent to the parties on 20 December 2023. The applications to amend the claim to include a claim for indirect discrimination and to add detriments to the claim of victimisation were refused. Written reasons having been requested in accordance with Rule 63(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The claim was listed for a preliminary hearing to determine the claimant's application to amend her claim.
2. The claimant made three separate applications to amend in correspondence. The claimant clarified that the application she wished to pursue could be located at page 280 of the bundle. The claimant gave further clarification in the hearing.
3. The claimant sought to amend her claim as follows:
 - To bring a claim for indirect sex discrimination, relying on the following PCPs:

Only allowing line managers onto the RRITE Management Course, discounting previous experience in the interview process and taking visibility on site into account in the recruitment process.

- To add a further allegation of detriment for doing a protected act – namely that the respondent character assassinated her/misrepresented her to the Tribunal as unprofessional or a bully in their employee statements.

4. I had before me a bundle of 287 pages and I heard submissions from the claimant and the respondent's representative.

Submissions

The application for amendment to include a claim for indirect discrimination

5. In respect of her the claim for indirect discrimination, the claimant submits that it was only upon receiving the respondent's disclosure in June 2023 that this claim came to light. The claimant accepts that she is attempting to bring w wholly new claim. She contends that the disadvantage to her is that a refusal of the amendment would prevent her from being able to present a claim which is stronger than her existing claim for direct discrimination and, as such, a refusal would be very detrimental.
6. In respect of a claim of indirect discrimination the respondent submits that the starting point is the importance of claims being confined to what is in the ET1 and that the claimant's application to amend is not clearly particularised. The nature of the amendment is substantial, the respondent submits that the greater the factual and legal enquiry raised by the new claim the less likely the Tribunal is to permit it.
7. The indirect claim involves an entirely new and different set of considerations. The Tribunal will be looking at access to training, the practices of working from home vs office working, there may be argument about whether the PCPs contended for are PCPs. Further disclosure will be required, the bundle amended, at least one additional witness, a longer full merits hearing and the costs of all of that. The respondent will also need to give consideration to the legitimate aims defence.
8. There is reference to training in the ET1 and the respondent does not accept that the claimant only became aware of that as an issue in June 2023. The possibility of an indirect claim could have been brought in the ET1.
9. The prejudice to the claimant is small, she can proceed with her dual direct discrimination case and the claimant can still challenge the recruitment exercise, which is at the heart of her case. The claimant has already been given permission to add a victimisation complaint which was not referenced in the ET1. The claim is out of time by around 18 months.

The application to amend to add a further allegation of a detriment

10. The claimant submitted that the further detriments are that Mrs Crosbie and Mr Cole described her as unprofessional and a bully within their employee statements of October 2022.
11. The claimant submitted that she was not aware of these documents until disclosure and that she is being portrayed in an untruthful light within the proceedings. She is not making a new claim but seeking to add to her victimisation claim. If the amendment is not allowed she will not be able to show the character of the respondent and the interview panelists.
12. The respondent accepted that granting the application to amend will not change the scope of the factual enquiry. The employee statements will be before the Tribunal and the claimant will have the opportunity of feeding these into her complaint of direct discrimination. This claim doesn't take her claim further forward, there will be no further compensation and this is overloading the claim. The claimant had already had the benefit of bringing a claim for victimisation which was not included in her ET1.

The relevant law

13. The Tribunal has power to grant a party permission to amend their claim by virtue of **The ET (Constitution and Rules of Procedure) Regulations 2013 rule 29** ('The Tribunal Rules'). The discretion contained within **r.29** must be exercised in accordance with the overriding objection in **Rule 2**.
14. The task for the Tribunal is to balance all relevant factors having regard to the interests of justice and, in particular, to consider the relative hardship, prejudice or injustice that will be caused to either party by granting or refusing permission to amend respectively (**Cocking v Sandhurst (Stationers) Ltd and Anor 1974 ICR 650** approved and restated in **Selkent Bus Co Ltd v Moore 1996 ICR 836** and further approved and restated in **Abercrombie v Aga Rangemaster plc [2013] EWCA 1148**).
15. Commonly, when considering the balance of prejudice, hardship or injustice, the Tribunal looks at a number of factors:
 - the nature, extent and impact of the proposed amendment including, as set out in **Abercrombie [48]**, to what extent it might raise new or different legal and factual issues
 - the applicability of time limits

- the timing and manner of the application to amend.

16. In appropriate cases, the Tribunal is also entitled to consider the merits / strengths of the complaints which it is proposed be brought by way of amendment. This is subject to the proviso that the Tribunal does so on a reasoned basis and keeps in mind that it does not have the full evidence before it (**Kumari v Greater Manchester Mental Health NHS Foundation Trust EA-2020-000833-VP [88]**). That exhortation or note of caution is particularly pertinent in cases involving allegations of discrimination or public interest disclosure which are often fact sensitive and can involve drawing inferences which might only be clear once all the evidence is heard.

Conclusions

17. In considering the applications to amend I take account of all the circumstances, including the nature of the amendment, time limits and the timing and manner of the application. I consider the specific practical consequence of allowing or refusing the amendment. At its core the application requires a balancing of the injustice and hardship caused in allowing or refusing the application.

Decision re indirect claim

18. I find that the nature of the amendment sought to include a claim for indirect discrimination is a pleading an entirely new cause of action. I also accept that granting permission to amend to include this claim introduces an entirely new factual and legal matrix. I accept that considerable prejudice would be caused to the respondent by way of further disclosure, witness evidence, the requirement for the justification defence to be considered and a longer final hearing, all of which will incur significant additional costs.

19. I do not accept that the indirect claim is stronger than the direct discrimination claim. If the amendment is refused the claimant is still able to bring her claim about the 2022 recruitment exercise, which is what the core of her claim is about. I have ordered disclosure of an email relating to the RRITE training. The claimant will still be able to raise the approach to training in support of her direct discrimination claim in the context of whether this fed into the recruitment decision making exercise.

20. The claim is considerably out of time, the claimant's ET1 form makes reference to her training not being equal to her comparator. The respondent's approach to training was in her mind at the time of her application yet the amendment application comes some 15 months later.

21. Weighing the injustice and hardship in granting or refusing the application I conclude that greater injustice and hardship would be caused to the respondent in granting the application than is caused to the claimant in refusing it. I therefore refuse the application.

Decision re additional detriments

22. This is not a substantive alteration, it is however an alternation and it is significantly out of time.
23. Granting the amendment would not cause significant injustice or hardship to the respondent. I do not accept that refusing the amendment will have the impact of not allowing the claimant to show the character of the respondent and the interview panel. The employee statements will remain before the Tribunal and the claimant may make submissions that these support her claim for direct discrimination. Thus refusing the amendment will not cause significant injustice nor hardship to the claimant either.
24. The injustice and hardship is more or less equal in refusing and allowing the amendment. However when I also consider the amendment previously made, to include a claim for victimisation, and what the claimant seeks to achieve with her current application to amend, there is no real hardship to the claimant in the refusal, however the granting would further burden the respondent who has already dealt with an amendment. On that basis the balance tips in favour of not granting the amendment and the application is refused.

Employment Judge C L Taylor

29 April 2024

Note

Public access to employment tribunal decisions

Judgments (apart from judgments under rule 52) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.