EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms A Howse	AND	Bournemouth, Christchurch and Poole Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY **ON** 2 May 2024
By CVP Video

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In person, assisted by Mr Brown and Mr Napier**
For the Respondent: **Ms D Gilbert of Counsel**

JUDGMENT ON APPLICATION TO AMEND

The claimant's application to amend the originating application is refused.

REASONS

1. In this case the claimant seeks leave to amend the claim which is currently before the Tribunal, and the respondent opposes that application.
2. The claim as it currently stands:
3. The general background and procedural history of the claim as it stands before the determination of this application is as follows.
4. The claimant presented these proceedings on 16 January 2023. She was directed by Employment Judge Midgley on 20 February 2023 to provide further information with regard to the claims which she was pursuing. There was then a case management preliminary hearing before Employment Judge Rayner on 3 August 2023 following which she set out a detailed List of Issues to be determined by the tribunal, and she listed the matter for a multi-day hearing. Following subsequent conversations and correspondence it became clear the issues were not finalised and the agreed hearing was postponed. There was another case management preliminary hearing before Employment Judge Gray on 22 April 2024. With his assistance the parties agreed a List of Issues subject to two discrete matters which

form the basis of the claimant's application to amend before me today. This is effectively the fourth iteration of the claimant's claims.

5. The claimant's claims are for unfair dismissal; wrongful dismissal with regard to notice pay; for detriment and automatically unfair dismissal said to arise from having made protected public interest disclosures; for direct discrimination on the grounds of a philosophical belief; harassment related to philosophical belief; and for an alleged failure to make reasonable adjustments in respect of the claimant's disabilities of dyslexia and hearing loss.
6. The claimant's claim for direct discrimination is because of the philosophical belief of bodily autonomy. She believes individuals including herself should be allowed to refuse medical treatment, including vaccination against Covid-19. The first part of the claimant's application to amend is to add a separate and distinct philosophical belief, namely the right to medical privacy (and that medical history should not be discussed or disclosed and that an employer organisation does not have any right to know the claimant's medical history). This is expressed to be a distinct and separate philosophical belief from that of bodily autonomy already relied upon.
7. The first allegation of direct discrimination as currently presented is that Mr Stannard of the respondent refused to deal with the claimant's whistleblowing complaints. In other words, although the claimant has separate complaints of detriment and unfair dismissal said to arise from having made protected public interest disclosures, the claim as currently pleaded asserts that Mr Stannard also failed to deal with her whistleblowing because of her philosophical belief. The claim is now not pursued against Mr Stannard and the claimant wishes to amend her claim to substitute the allegation that it was Rosie Verrico of the respondent who refused to deal with the claimant's whistleblowing complaints on the grounds of her philosophical belief.
8. The applicable law:
9. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of Chapman v Simon [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.
10. In Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA.
11. The EAT held in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors would include:
12. 1 - The nature of the proposed amendment - applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition 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 has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and

13. 2 - The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended. (Whether this is still "essential" is considered further below); and
14. 3 - The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. 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.
15. These factors are not exhaustive and there may be additional factors to consider, (for example, 4 - The merits of the claim).
16. The Balance of Prejudice: per HHJ Tayler in Vaughan v Modality Partnership UKEAT/0147/20/BA(V): [21] "… Representatives have a duty to advance arguments about prejudice on the basis of 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 … [26] a balancing exercise always requires express consideration of both sides of the ledger, both quantitatively 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 costs; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice."
17. As for - The nature of the proposed amendment: A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim (often called "relabelling"); and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.
18. Mummery J in Selkent suggests that this aspect should be considered first (before any time limitation issues are brought into the equation) because it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from "relabelling" the existing claim. If it is a purely relabelling exercise than it does not matter whether the amendment is brought within the timeframe for that particular claim or not – see Foxtons Ltd v Ruwiel UKEAT/0056/08. Nevertheless whatever type of amendment is proposed the core test is the same: namely reviewing all the circumstances including the relative balance of injustice in deciding whether or not to allow the amendment (that is the Cocking test as restated in Selkent).
19. 2 - The applicability of time limits: This factor only applies where the proposed amendment raises what effectively is a brand new cause of action (whether or not it arises out of the same facts as the original claim). Where the amendment is

simply changing the basis of, or "relabelling", the existing claim, it raises no question of time limitation – (see for example Foxtons Ltd v Ruwiel UKEAT/0056/08 per Elias P at para 13).

20. There are now conflicting authorities on the applicability of time limits and the "doctrine of relation back", that is to say that an amendment relates back to the date of presentation of the claim form. The opposing view is that an amendment takes effect from the date of the amendment, and that time limits are to be assessed as a substantive matter as against that date.
21. The view more recently taken by HHJ Tayler in Vaughan v Modality Partnership UKEAT/0147/20/BA(V) (9 November 2020) is this - There has been some confusion as to whether a tribunal may grant an amendment in the form of a new claim without applying the law of time limits to the new claim at the time of application. HHJ Tayler reminds us that a tribunal may do so and suggests that the Selkent categories are regularly misunderstood. Whether the claim may be out of time is just one matter that the EJ has regard to in exercising discretion on whether to allow the amendment. It is not necessarily conclusive.
22. 3 - The timing and manner of the application: This effectively concerns the extent to which the applicant has delayed making the application to amend. Delay may count against the applicant because the Overriding Objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment - see Martin v Microgen Wealth Management Systems Ltd EAT 0505/06. However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings. This is confirmed in the Presidential Guidance on General Case Management for England and Wales (13 March 2014).
23. The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in Ladbrokes Racing Ltd v Traynor EATS 0067/06: the Tribunal will need to consider: (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.
24. Langstaff P made the following observations in Chandhok v Tirkey [2015] IRLR 195 EAT from paragraph 16: "The claim, as set out in the ET1, is not something to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning … the claim as set out in the ET1. [17] … If a claim or a case is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not

contained within the claim form. Such an approach defeats the purpose of permitting or denying amendment; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in light of the identification resolving, the central issues in dispute. [18] In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverting into thinking that the essential case is to be found elsewhere than in the pleadings."

25. This Judgment:
26. Applying these legal principles above to the current application, I find as follows.
27. The first part of the amendment application is to add the new philosophical belief relating to medical privacy. The claimant has explained in detail why this is a separate and distinct concept from the first philosophical belief namely her belief in bodily autonomy. In my judgment this falls within the third category of amendments under Selkent, namely the claimant is seeking to a wholly new cause of action. This will require the respondent retrospectively to answer allegations of whether vaccine status falls within the scope of medical privacy and whether employers are entitled to be made aware of employees' medical history or vaccine status, as well as having that belief, or (as the respondent says) because she was failing to comply with reasonable management instructions. In addition, this application is made substantially out of time in relation to proceedings which were issued well over a year ago.
28. Furthermore, the allegations involve Rosie Verrico, (who is a former employee of the respondent) and her involvement also forms the basis of the second application to amend. In my judgment this proposed amendment is a form of relabelling and comes with the second category of Selkent, because this allegation is linked to or arises out of the same facts as the original claim. This will expand the scope of the enquiry into whether any protected disclosure was made to Ms Verrico, secondly whether she was required and/or was the appropriate person to respond to a whistleblowing complaint; and finally whether there was any failure by her in that regard.
29. The difficulty which the respondent faces is one of real and actual prejudice because Ms Verrico is no longer an employee of the respondent, and it is still unclear the extent to which she will voluntarily engage in assisting the respondent in answering the allegations currently before this tribunal. This is not a case of perceived prejudice as envisaged by Vaughan, but rather a set of circumstances which will cause the respondent actual hardship and prejudice in having to deal with either of the proposed amendments.
30. The claimant already has a wide range of differing complaints within an agreed List of Issues which have now again been listed for determination in a multi-day case. The hardship to the claimant in refusing the amendment is to deny her the right to rely on a new and different philosophical belief and to deny her the right to clarify that one allegation of discrimination is now against Ms Verrico. Given the length of

detail of the remaining claims in my judgment denying this amendment application would not cause substantial hardship.

31. On the other hand, to allow either of the proposed amendments so late in the day would cause the respondent prejudice and substantial hardship because they could well be precluded from preparing to answer these allegations in an informed manner. In addition, it is not certain whether they would be able to do so within sufficient time and/or before other employees also leave their employment, which could well cause further delay in resolving a claim which has already incurred significant delay and in respect of which it is not in the interests of justice to risk a further postponement.
32. I apply the unvarnished Cocking test. In exercising my discretion, I have had regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This is the test which was approved in subsequent cases and restated by the EAT in Selkent, and endorsed by the Court of Appeal in Ali. In my judgment allowing the amendment application would cause greater injustice, hardship and prejudice to the respondent, and for these reasons I refuse the claimant's application to amend her claim.

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Employment Judge N J Roper
Dated: 2 May 2024

Judgment sent to Parties on
30 May 2024 By Mr J McCormick