Case No: 3202142/2020

EMPLOYMENT TRIBUNALS

Claimant: Mrs K Wimbourne

Respondent: Forefront Utilities Ltd

Heard at: **East London Hearing Centre**

On: **5 July 2023**

Before: Employment Judge Jones

Representation
Claimant: in person
Respondent: Ms L Simpson, Counsel, and Mr B Stepney, Solicitor

JUDGMENT

The Claimant's application for leave to amend her complaints were refused.

The Unfair Dismissal complaint is struck out as the Claimant had not been continuously employed for a period of not less than two years ending with the effective date of termination; contrary to section 108(1) Employment Rights Act 1996.

REASONS

This was an open preliminary hearing to determine the following, (as set out in the Tribunal's letter of 13 April 2023):

(1) Whether or not the Claimant's application for leave to amend should be granted
(2) If so, to make case management orders
(3) If not, to consider whether to strike out the unfair dismissal because the Claimant did not have the required two years' service

Today, the Tribunal had oral submissions from both parties. Counsel for the Respondent also prepared written submissions and a bundle of the relevant documents, which the Claimant had an opportunity to read before the hearing.

The Tribunal had to consider whether to allow the Claimant to amend her complaint of unfair dismissal to add two new complaints of whistleblowing detriment and automatic unfair dismissal because she made a protected disclosure and an allegation of harassment on the grounds of race and/or religion and belief.

History of the matter

Today the Tribunal has to consider an application by the Claimant to amend her complaint of unfair dismissal to add two new complaints of whistleblowing detriment and automatic unfair dismissal because she made a protected disclosure and an allegation of harassment, which she has firmed up today and stated that it was on the grounds of race and/or religion and belief

The Claimant issued her claim for unfair dismissal at the employment tribunal on 18 August 2020. Her effective date of termination was 8 July 2020. The claim is in time and was issued in accordance with section 111(2)(a) Employment Rights Act 2996.

In the ET1 claim form which the Claimant submitted to the Tribunal on 18 August 2020, there was no reference to whistleblowing, detriment, race or religion, harassment or Mr Walker. Also, contrary to what the Claimant stated in her letter to the Tribunal dated 20 December 2020, there were no emails attached to it that referred to any of those matters.

On 9 December 2020, the Employment Tribunals wrote to the Claimant to advise her that as she had not been employed for two years or more at the date of dismissal, she may not be able to continue with her complaint of unfair dismissal. The Tribunal was proposing to strikeout the claim on that basis. Section 108(1) of the Employment Rights Act 1996 applies.

On 24 December 2020, the Claimant responded to the Tribunal's letter. The Claimant attached some emails exchanged between her and various members of the Respondent's staff towards the end of her employment. Also, she stated that she had *'inadvertently neglected to add several vital discriminatory submissions crucial to my claim in the Tribunal when I submitted the initial request to you'*. She stated that these matters had already been raised with the Respondent and that she had 'naively assumed' that the Tribunal would have the documents related to these matters. The Claimant requested that the Tribunal also consider complaints of discrimination namely, that in April 2020 she told the HR Manager that the plant manager, Russell Walker had been calling her a '*Jewish princess'*, which she found *'incredibly upsetting'* and that she had been subjected to unlawful treatment because she made a protected disclosure in April 2020, that she was anxious that the Respondent had no Covid protection measures in place to protect the staff. In the letter of 24 December, the Claimant stated that when she told Ms Palmer about her concerns about the lack of Covid protection measures, Ms Palmer told her that she felt the same.

Unfortunately, the ET failed to send a copy of the Claimant's application to the Respondent. As a litigant in person the Claimant may not have appreciated that

all correspondence to the Tribunal must be copied to the other party, which meant that the Respondent did not receive a copy of the 24 December 2020 letter until earlier this year.

It is likely that both parties assumed that the Claim had been struck out as the Claimant failed to chase it and the Tribunal had no communication from the Respondent either.

ACAS communicated with the Respondent on 16 March 2023. The Respondent wrote to the Tribunal to check on the progress of the matter. On 29 March EJ Moor directed that this open preliminary hearing should be set down to address the issues set out above.

On 27 June 2020, the Claimant wrote to the Tribunal in support of her application to amend the claim. This was copied to the Respondent. Counsel for the Respondent also prepared submissions and a bundle of relevant documents.

From those documents and from her submissions this morning, which were different to the statements in the application in December – The Tribunal concludes that the Claimant wishes to raise a complaint that she suffered detriment and automatic unfair dismissal because she made a protected disclosure in April and again in May 2020 about the lack of Covid precautions in the office. She also wishes to bring a complaint of harassment in relation to conduct she alleges was displayed by Mr Russell Walker when he referred to her on a regular basis as a '*Jewish princess'*, either on the grounds of religion or belief, or on race.

Law

The Tribunal considered the following law, in addition to what has already been referred to above:

The starting point is the case of *Chandok v Tirkey* [2015] ICR 527, in which the EAY stated that the claim was not *'something just to get the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever parties choose to add or subtract merely upon their say so……it set out the essential case. It is that to which a Respondent is required to respond'.*

Any proposed amendment to the claim must be properly and fully formulated as set out in the EAT decision referred to in the Respondent's submissions, of *Scottish Opera Limited v Winning* UKEAT/0047/09. In that decision the EAT stated that *"Clear and accurate pleadings are of importance in all cases, but particularly in discrimination claims. It is essential that parties seeking permission to amend to introduce such a claim formulate the proposed amendment in the same degree of detail as would be expected had it formed part of the original claim; and tribunals should ensure that the terms of any such proposed amendments are clearly recorded."*

The Tribunal considered the principles set out in the case of *SELKENT Bus Co v Moore* [1996] IRLR 661 and *Vaughan v Modality Partnership* [2021] IRLR 91 EAT. Both cases stress that the core test in considering an application to amend is the fundamental exercise of balancing injustice and hardship in allowing or refusing the application. In doing so the Tribunal will consider the nature of the amendment, the applicability of time limits and the manner and timing of the application.

The Tribunal's decision on the application

It is this Tribunal's judgment that the Claimant is seeking to add two entirely new complaints to her case. There are no discrimination or whistleblowing/protected disclosure complaints hinted at or referred to in the present claim in the ET1.

If as she said this morning in her submissions, the Claimant has always considered that Ms Palmer had a vendetta towards her and had it in for her and that this was the motivation behind her dismissal; it is not clear why that was not raised in the appeal against dismissal or in the claim form. In both those documents – which were written when the matters were fresh in her mind - the Claimant is at pains to point out that the sequence of events in the car park is not as the Respondent says and that she did not do as alleged in speaking to the driver. She complains that the Respondent did not follow a fair procedure leading up to the dismissal and that she was unfairly dismissed. She did not refer at all in her claim or in her appeal against dismissal, (on pages 83 and 88) to her relationship with Ms Palmer or her relationship with Mr Walker. In her letter dated 7 July to Ms Palmer about the forthcoming disciplinary hearing, she strongly denies the allegation regarding her conduct to the forklift driver who ran into her car. She is adamant that she did not speak to him, as alleged or at all. Although it was clear from the letter inviting her to the disciplinary hearing that there was also an allegation concerning Mr Walker, the Claimant made no mention of that allegation in her letter of 7 July and does not tell Ms Palmer that, as she told the Tribunal today, she was only taking disciplinary action against her because the Claimant spoke to her about the Respondent's failure to put Covid precautions in place for staff.

Although it is clear from the invitation letter to the disciplinary hearing and the decision letter informing her of the dismissal – that the Respondent considered that the Claimant had behaved inappropriately to Mr Walker – the Claimant does not refer in her appeal letter or in her claim form to him making inappropriate or discriminatory remarks to her on a regular basis. Her application to amend today was that he referred to her as a '*Jewish princess'* on a regular basis at work and said it out of earshot of colleagues. She stated that this upset her and that she raised it with Ms Palmer in April 2020. The Respondent have no record of such a complaint.

In relation to the whistleblowing complaint – the Claimant states that she was one of a few workers in the office who complained in April and May, about the lack of Covid precautions. March, April, May 2020 were scary times for office workers, and it is likely that the Claimant was not the only one raising this issue.

She spoke to Ms Palmer about it and also, the Health and Safety manager who eventually organised hand sanitiser and masks for everyone. The directors and owners of the business did not take issue with the Claimant about this. In her

letter of 24 December 2020, the Claimant stated that when she told Ms Palmer, she agreed with her. Today, the Claimant stated that Ms Palmer's reaction had been to laugh and tell the Claimant not to worry about it. Nothing else was said to her about this by anyone.

The Claimant confirmed today that no one else was dismissed or had any issue with their employment following them raising a complaint about what they saw as a lack of Covid precautions in the office.

The Tribunal's conclusion is that even if the Tribunal were to conclude that the Claimant made a protected disclosure when she raised her perception that there was a lack of Covid precautions in April and May; there is little reasonable prospect of her being able to link that to her dismissal in July, when there were other people who also raised the same issue and there was no adverse response to them. There was no adverse response to her. There was considerable time between her raising this issue and her dismissal. The Respondent agreed with her that Covid precautions needed to be put in place and the Respondent sourced masks and hand sanitiser as soon as it could and put those in place. This would be a weak claim and one with little reasonable prospects of success, if were allowed to proceed.

There is also a high likelihood that the complaint regarding the possible protected disclosure would be out of time. The conversations that the Claimant had with Mr Palmer about this and with the Health and Safety Manager were in April and again in May. She first raised this as a possible complaint for the Tribunal in her letter in December 2020. There was no reason given for the delay in bringing this to the Tribunal and no explanation for why, if it was one of the Claimant's concerns, she did not include it in her ET1.

The Tribunal also considered the complaint she wishes to purse regarding Russell Walker that he made discriminatory remarks towards her by repeatedly calling her a *Jewish princess* at work. If that had happened, it is likely that she would have put that in her letter of appeal against dismissal as she would have read in the dismissal letter that he had made serious allegations against her about her conduct towards him. The obvious thing to do in response would be to say that he had also been displaying inappropriate conduct towards her.

This allegation is also old as the Claimant states that she raised it with Ms Palmer in May 2020. The application to amend was made in December 2020. It is unclear to the Tribunal why the Claimant did not refer to these two matters in her claim form and why they were not raised with the Tribunal until the Tribunal wrote to her to inform her that she was unlikely to be able to pursue a complaint of unfair dismissal as she did not have two years' service with the Respondent.

No particular special legal language would have been required. As a litigant in person, the Tribunal would simply expect the Claimant to set out the things that she considered to have been unfair or done incorrectly or unjustly towards her. That would have included allegations of discrimination.

The Claimant confirmed in her submissions today that at the time she brought the claim, she was aware of the 2-year requirement to bring a complaint of unfair dismissal and that she did not meet it. It was not clear whether she was also

aware of the three-month time limit to bring these claims. She did not submit that she was ignorant of the time limits.

The Claim form asks whether the person completing it wants to complain about discrimination or any other matter. The Claimant did not write anything about that and instead, set out the reasons why she considered that her dismissal was unfair

It is clear from the contents of the ET1 claim form that the Claimant disagrees with the Respondent's version of events relating to the dismissal and that she is aggrieved by having been dismissed. She is adamant that she never spoke to the driver who damaged her car and denies making threats to him.

As stated in section 111 Employment Rights Act and in section 123 of the Equality Act, complaints of discrimination and of automatic unfair dismissal because of a protected disclosure, must be brought to the Employment Tribunal before the end of the period of three months, beginning with the effective date of termination. The same time period applies to as complaint of detriment for making a protected public interest disclosure. Whether the Claimant is alleging harassment or less favourable treatment in relation to the Respondent's handling of the complaints she raised about Russell Walker's comments to her; the time limit is the same three months from the date of action or inaction. There has been no submission that there is a continuing act. The Claimant stated that her whistleblowing was Ms Palmer's motivation for dismissing her but the evidence before the Tribunal today was that Ms Palmer may have drafted documents but that she was not the person who dismissed the Claimant.

The whistleblowing and discrimination complaints should have been submitted to the Tribunal within 3 months of them happening, even if the Claimant was still employed, when they allegedly happened.

The Tribunal considers that the balance of injustice and hardship weighs against the Claimant and towards the Respondent here – given the difficulty that the Tribunal was told that the Respondent would have in defending these complaints given that Ms Palmer is no longer employed and also seriously unwell and that Mr Walker has also left the Respondent's employment.

As the HR Manager at the time, Ms Palmer's evidence would be necessary to defend the discrimination and whistleblowing complaints as well as the dismissal complaint. The Respondent would be put to a disadvantage if it had to defend these claims without her evidence.

Ms Palmer stated in her written witness statement dated 8 July that some of the Respondent's documents in the Claimant's personnel file had been removed. That suggests that the Respondent would have difficulty finding the documents necessary to defend this claim. It is possible that this can be resolved by downloading documents from the server and this was not part of the reason that the Respondent submitted that the amendments should not be allowed.

From the Claimant's perspective, the Tribunal is aware that the Claimant would be prejudiced if she was not allowed to bring these claims as there is no other forum in which she could pursue them. However, the Tribunal has not been given a good or satisfactory reason for her failure to have brought these complaints to the Tribunal before she had the letter from the Tribunal informing her of an issue with the admissibility of her unfair dismissal complaint or in the ET1 claim form.

Having considered all the relevant factors and the law – it is this Tribunal's judgment to refuse the Claimant's application for leave to amend her claim to add a complaint of whistleblowing detriment and automatic unfair dismissal as well as discrimination or harassment on the grounds of race and/or religion or belief. The reasons for this are summarised as follows:

- Because they were brought late – with no good or any reason
- Because no good reason and no reasons were given on why they were left out of the ET1 claim form – especially if she was aggrieved about these matters, as the Claimant stated today;
- Because they are weak and as explained above, have little or no reasonable prospects of success; and
- Because of the prejudice to the Respondent, as explained above.

Once the hearing resumed, the Tribunal read out these reasons and informed the parties of its decision on the application to amend.

The Tribunal confirmed with the Claimant that she had not been employed with the Respondent for at least two years on this occasion. She confirmed that this was the case. She also confirmed that she last finished working with the Respondent in 2015, some three years before starting the contract in 2018. It is therefore not possible to join those periods of work together to comply with the requirements of section 108(1) Employment Rights Act 1996.

The Claimant had no additional submissions to make on the issue of the Tribunal's jurisdiction hear her complaint of unfair dismissal. The Tribunal was clear that no view had been taken about the strength or merits of the unfair dismissal claim. The Tribunal cannot do that until it is confirmed that it has jurisdiction to do so. The Tribunal had to consider the strength and merits of the proposed discrimination complaints as part of the application to amend, which was a different process.

The Claimant had not completed two years' service by the date of dismissal.

The Claimant had previously worked for the Respondent, but her last contract ended in 2015. She started a new contract in 2018 and this had not continued for at least two years before her dismissal.

The Tribunal has no jurisdiction to hear a complaint of unfair dismissal if the person is employed for less than two years

The complaint is dismissed.

The Claimant's claim is dismissed. Any existing orders and hearing dates are vacated.

Employment Judge **Jones**

5 July 2023