EMPLOYMENT TRIBUNALS

Claimant: Mrs H Mackley

Respondent: MAG Limited Stansted Airport

Heard at: **East London Hearing Centre**

On: **16 April 2024**

Before: **Employment Judge Jones**

Representation
Claimant: in person
Respondent: Mr R Mitchell, Solicitor

JUDGMENT

The Claimant's application to amend her claim is refused.

REASONS

This claim was issued on 19 January 2023. In that claim, the Claimant makes complaint of constructive unfair dismissal - following a restructure which she described as a sham. It is her case that in the restructure she was treated less favourably than a younger male employee. She also complains of direct sex discrimination and age discrimination.

The Respondent submitted its response to the claim on 21 February 2023.

At a preliminary hearing on 22 June 2023, the Clamant clarified her and as a result, the Respondent submitted an amended Response to the claim.

The minutes from the 22 June hearing record that the Claimant's complaint of direct sex and age discrimination was that: -

1. *She relied on Sam Lomax and Lee Williams as her comparators as they are male and in the 30 – 40 age group whereas she is female and in the 50 – 60 age group. It is her case that Mr Williams does the same job that she did at the Respondent and that Mr Lomax was doing the job that she took over, was paid at Band 5, as she was before her pay was decreased.*

The Claimant also relies on a hypothetical comparator.

2. *That the acts of sex and age discrimination were (1) reducing the Claimant's salary by £5,000 following the restructure; (2) failing to properly consider or to properly evaluate the Claimant's role; (3) misleading the Claimant between March and July 2022 in relation to the re-grading process and in relation to her role as Terminal Co-ordinator; and (4) Rachel Miller informing the Claimant at a meeting on 28 July that she had been paid too much for the past 4 years.*

The complaint of constructive unfair dismissal also arises from the restructure, the promised job re-evaluation and whether the process was fair and proper; and is also related to the Claimant's workload.

On 22 November 2023, the Claimant wrote to the Tribunal to make an application to amend her claim to issue a complaint that the Respondent has breached the equality clause in her contract and that she has not been paid Equal Pay with her comparators. The Respondent opposed the application and today's hearing was arranged to deal with it.

The Tribunal apologises to the parties to the delay in the production of this decision and reasons. The pressure of work on the judge meant that this has been produced a few days late. The Tribunal apologises for that delay.

The application to amend

The Claimant is a litigant in person. In her written application she explained the following reasons for her late application to amend the claim: (1) The amended response had new information regarding the comparators pay banding that the Respondent had previously refused to give her, (2) she only recently obtained legal advice about her claim which confirmed that she might have a claim, and (3) the Respondent's refusal to '*provide a comparator of equal value'*, (which is not clear to this Tribunal).

In the hearing, the Claimant clarified that all attempts at discussing comparators were *'blanked'* by the Respondent and the statements at paragraph 47.1 and 47.2 in the amended response provided information that she did not have before, and which led her make this application. In those paragraphs the Respondent provided dates on which the Claimant's two comparators, Mr Williams and Mr Lomax occupied certain Pay Grades and when they moved on to a different Pay Grade. The Claimant did not have the dates before. She did know their pay grades.

The Claimant also submitted that she was aggrieved about the re-evaluation process. She alleges that she had been treated as admin staff and put in a pool with them, whereas she maintains that her work was mostly compliance work and that she should have been pooled with those who did compliance work such as Mr Lomax and Mr Williams.

It is her case that on 21 June, Ms Lindsey Millar wrote to Rachel Millar and advised that the Claimant's job was materially different from that of an administrator, but the Respondent took no notice. It is also her case that although she was promised a re-evaluation of her job, the Respondent failed to look at her documents and continued to consider her as an administrator.

The Claimant added that she considered that she did work of equal value or work that is broadly similar to the other compliance managers in the airport, i.e., Mr Williams, Mr Lomax, Ms Rebecca Dow, and Mr Simon Parker. The last two had not been previously mentioned in the case.

The Claimant was not clear of the actual allegation she wished to add to her claim. However, from her observations in the hearing, the Tribunal finds it likely that she wants the Tribunal to consider that she was doing the same work or work of equal value to her comparators and that therefore she should have been paid the same as he was and retained on Band 5, after the restructure and that the Respondent's decision not to do so was in breach of the equality clause. She also stated that she did the same investigation and compliance work as Mr Parker and attended the same meetings as Mr Williams. She stated in her application and in the further information she provided on 12 January, that all her comparators did compliance work, as she did and therefore, she should be paid the same.

It was also her case that she tried to get the Respondent to give her details of comparators and they refused to do so and so she did not know the details until the Amended Response. She stated that it was also the results of DSAR (Subject Access Request) that led her to believe that she had to make the application to amend.

The Claimant also spent a lot of time in this hearing and in the earlier preliminary hearing explaining her position on the restructure and the Respondent's promises to re-evaluate her job and her belief that they totally misled her by failing to do so. It is likely that this is a significant part of the case for the Claimant.

The Respondent's position

The Respondent disputed that there was anything in their Amended Response that was new to the Claimant, or which would have led the Claimant to question whether she could bring a complaint about equal pay. They submitted that the new complaint was completely unparticularised.

The Respondent reminded the Tribunal that there had been a discussion about Equal Pay in the first preliminary hearing in this matter and that during that conversation the Claimant stated that she did not want to bring an equal pay complaint and that there was no one who was a direct comparator to her because no one else at the airport did the exact role that she did.

The Respondent submitted that the Claimant could have raised this complaint in her original ET1 and failed to do so and that she is out of time to bring an Equal Pay complaint in any event.

overriding objective

The overriding objective of the Tribunal Rules is to enable employment tribunals to deal with cases justly and fairly. This entails, so far as practicable (a) ensuring that the parties are on an equal footing, (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in proceedings; (d) avoiding delay,

so far as compatible with proper consideration of the issues; and (e) saving expense.

The Rules also say that a Tribunal will give effect to the overriding objective in interpreting, or exercising any power give to it by the Rule and that the parties and their representatives shall assist the Tribunal to further the overriding objective.

The Tribunal therefore also must balance the costs and resources involved in allowing/refusing these amendments to both parties.

The Tribunal had regard to the following law in considering this application.

Law

The Respondent referred the Tribunal to the case of *Chandhok v Turkey* [2015] ICR 527 in which it was stated that the ET1 claim form is not just something to set the ball rolling. It is not free to be augment by whatever the parties choose to add or subtract at a later stage in the proceedings.

The power to amend is, as Mummery J pointed out in *Selkent Bus Co v Moore* [1996] ICR 836, a judicial discretion to be *exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions'.* The EAT set out general practice and procedure governing the approach a tribunal should take when considering amendments to existing claims, as follows: -

> *"(4) Whenever the 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 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 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 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 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."

As the EAT observed in the case of *Vaughan v Modality Partnership* [2021] ICR 535, the principles in *Selkent* above are not to be treated as a tick box exercise. They also stated as follows: -

21. Underhill LJ [in Abercrombie v Aga Rangemaster Ltd [2014] ICR 209] 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 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. 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."

The power to amend is also confirmed in the 2018 Presidential Guidance on General Case Management.

As the Tribunal also has to consider time limits in relation to the complaints that a claimant wishes to add to a case, it also need to be aware of the provision of section 129 Equality Act 2010 which states that a complaint which relates to a breach of the equality clause or rule, must be brought to the employment tribunal after the end of the qualifying period, which in this case, is 6 months beginning with the last day of the employment.

In this case, the Claimant's employment terminated on 31 August 2022. The application to amend would therefore be out of time as it was brought in November 2023, i.e.,15 months later. There is no discretion to extend time in an Equal Pay complaint.

Decision

The Claimant's application to amend is not an amendment of an existing complaint as ticking the sex discrimination box does not introduce an equal pay complaint.

This application is to introduce a completely new complaint into this case. It is also not a matter of relabelling as it would require a completely different analysis to the existing claims, as well as new evidence. Although the complaint is based on the same facts – there will need to be further clarification as to how exactly the Claimant puts her case, given that she has now included a female comparator. Lastly, the Claimant is seeking to add two new comparators, which has been held in law to be adding another new complaint rather than amending an existing one.

The Claimant's initial complaint in her ET1 was that the Respondent had refused to provide her with details about her comparators. However, she included a complaint that Sam Lomax was paid at Grade 5 for the same job that she was offered at Grade 6 and that her pay was reduced by £5,000, because she was an older female. The Claimant referred to being treated worse than or less favourably to her younger male colleagues. The Claimant expanded on this in the preliminary hearing as set out above. There was sufficient information on which to bring an Equal Pay complaint, which is why we had a discussion about that possibility at that hearing. The Claimant was clear that she was not bringing

an Equal Pay complaint.

Taking the factors outlined in the law in turn. Firstly, the nature of the amendments. This amendment would be a substantial change to the existing case. The application of the law on Equal Pay to these facts would require a detailed analysis of the job descriptions of the Claimant and her comparators, a decision on whether these jobs are of equal value or otherwise, which is likely to need to be done at a separate hearing. The Tribunal will need to make an assessment of the analysis and comparisons that have already been done by the Respondent. The Respondent would firstly need to amend its Response again. It is likely that the present listing would give insufficient time to consider this as well as the existing complaints and the listing would need to be adjusted to add another day or two or there will need to be additional preliminary hearings. This will increase the expense and time that is required to consider and decide on these complaints.

As the Respondent has submitted, the details of the Equal Pay complaint remain unclear. The Claimant still needs to clarify over what period she says she did the same or work of equal value to the comparators and why she says that she was doing so. She stated in the hearing that she met her comparators in compliance meetings but that may not be sufficient to claim that they were all doing like work or work of equal value.

Secondly, the applicability of time limits. Although the Claimant seems to be hinting at concealment and that the Respondent tried to hide the information on the pay grades from her, that does not appear likely as she already knew that her wage had been reduced by £5,000 and she knew the pay grades applicable to Mr Lomax and Mr Williams. When she issued her ET1, the Claimant believed that she had been doing work that was the same or similar to that of her comparators. She believed that she was treated as admin staff whereas she considered that she was compliance staff, like Mr Williams and Mr Lomax when he was in the post she occupied before the Respondent's re-structure. She therefore had sufficient knowledge of the matters she wishes to add to her claim at the time she issued her ET1. She could have brought this Equal Pay complaint at the same time as the other matters in her claim form or clarified it at the preliminary hearing.

The Claimant is a litigant-in-person. She has presented her case and her application to amend without legal assistance. However, the facts as presented in her application and which she explained in this hearing were known to her personally. The Claimant had an opportunity at the previous preliminary hearing to discuss the complaint of equal pay but having discussed it, she was clear that she did not want to do so. She did not discuss with the Tribunal any concerns that she may have had about whether she could bring such a complaint.

Lastly, The timing and manner of the application. The Claimant's grounds for making the application when she did was that the Respondent's Amended Grounds of Resistance and the results of her DSAR led her to think that she should bring such a claim. The Claimant did not clarify in the hearing what was in the results of her DSAR which caused her to reconsider her decision to bring an Equal Pay complaint. The information in the Amended Response at paragraph 47 does give the Claimant more details about the position of her

comparators but it is likely that it was not new to her as she had already stated that Mr Lomax had been paid at Band 5 and that she was initially paid at Band 5 but was reduced to Band 6, which she believes was due to being a woman and being in an older age group.

In addition, the Claimant seeks to bring an Equal Pay complaint outside of the strict 6 months' time limit in a case where there is no allegation of concealment. The Claimant's last day of employment was 31 August 2022. Her employment ended by resignation on 31 July. The Claimant therefore new when her employment was coming to an end and had the opportunity to seek legal advice for any complaints that she wished to make, well before or soon after her employment ended. The claim was not brought until 19 January 2023, after a period of ACAS Conciliation. The application to add the complaint of a breach of the equality clause, also known as Equal Pay, was not made until 22 November 2023. Any complaint of a failure to pay Equal Pay should at the latest have been brought by 28 February 2023, taking into account the period of early conciliation. The Tribunal has no discretion to extend time to allow a Claimant to bring an Equal Pay claim.

Injustice and hardship

If these amendments were allowed, the case would expand. The Tribunal has already set out above what the additional steps necessitated by this new complaint would be.

If the application to amend was not granted, the Claimant would not be able to pursue this complaint. However, the Claimant would be able to pursue her claim that she was treated less favourably on the grounds of age and sex. The Claimant will still be able to pursue her complaints that the Respondent treated her less favourably by reducing her wage by £5,000 after the restructure in comparison with a man who was paid at the higher rate when he did the same job. She can pursue all the matters set out in the case management discussion minutes from the hearing on 22 June 2023.

Should the claim be issued, the Respondent will be faced with a completely different claim than the one first presented. The Claimant submitted that this should not matter because the Respondent has many employees and more resources. This is likely to be true but, the Respondent is still entitled to know the case it has to defend and for that to be clear so that it can set out its defence and marshal its resources to do so.

Lastly, the complaint is out of time and this Tribunal has no jurisdiction to extend time to bring it in time.

Conclusion

The Tribunal has considered the Claimant's application in full and in detail. It has also considered the Respondent's resistance to the application. Balancing the injustice and hardship in relation to the application, it is this Tribunal's judgment that the balance is against the Claimant because the claim is out of time. Also, the exact complaint she wishes to bring remains unclear, and the Tribunal was not given a reason why these matters were not included in the claim when it was issued in January 2023. In addition, the issues of Mr Lomax's pay for the same

job the Claimant did after the restructure, is already part of the case and will be considered as part of the direct sex and age discrimination complaint. The Claimant also compares herself with Lee Williams, who she says also did the same job but was paid more.

The Claimant could have brough this complaint as part of her original ET1 claim form. The Tribunal is not convinced by the reasons why relies on for why she is only now seeking to add this complaint to the case. All the facts were known to the Claimant when she issued her ET1 claim.

Any hardship that the Claimant would suffer by the Equal Pay complaint not becoming part of her case will be mitigated by the fact that her main complaint in relation to her dismissal and that the change to her wages wad discriminatory, will all be considered as part of her existing complaints.

The Claimant's application to add a complaint of Equal Pay is not allowed.

For those reasons and the reasons set out above, the Tribunal refuses to allow the Claimant to amend her claim.

The Claimant's complaints which will now proceed to a final hearing are as set out in the minutes of the preliminary hearing held on 22 June 2023.

The parties are to comply with the orders made that day so that the case will be ready for the hearing which is scheduled to begin on 17 September 2024.

Employment Judge **JONES**

19 June 2024