EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Mandie Monroe	v	Central Bedfordshire Council

Heard at: Watford **On:** 11 to 14 September 2023

Before: Employment Judge S Bedeau

Members: Mr M Bhatti MBE
Mrs G Bhatt MBE

WRITTEN REASONS

1. On 20 November 2023, the judgment on liability was sent to the parties following a hearing on 11-14 September 2023. The Tribunal held that the claims of public interest disclosure detriment, harassment related to disability, and harassment related to transgender, were not well-founded and were dismissed.

2. On 22 November 2023, the claimant wrote to the Tribunal requesting written reasons for the refusal to allow her application to amend. It appears that her application was not responded to. She then wrote to the Tribunal on 1 July requesting an update. As the Judge in the case I was not made aware of the her request until 28 October 2024. I can only apologise to her for the inordinate delay.

3. Oral reasons were given on the first day of the liability hearing, though not repeated in the written judgment.

REASONS

4. On 3 August 2023, the claimant applied to amend her claim by adding victimisation. She wrote that, on 18 May 2022, she made a complaint of ableism and transphobia to Ms Katie Thurston, former Housing Systems Officer, Ms Katie Voice, Homeless Intervention Manager, and Ms Naomi

Rodriguez, former Housing Options Team Leader, who advised her to complain to her agency, which she did. She asserted that Ms Voice failed to investigate any of her complaints she made and accused her in a Teams message, dated 18 May 2022, to another work colleague, Ms Charlotte Guerney, of being "too much drama" and expressed the intention to terminate the claimant's employment. The proposed amendment was in the following terms:

> "s.27 Victimisation
>
> 1. Did the claimant do a protected act? Namely:
>   a. Raise a complaint of transphobia and ableism on 18 May 2022?
> 2. As a result of this, did the respondent subject the claimant to the following detriments:
>   a. Not having her complaint investigated, leading to the claimant feeling the need to stay off work for 5 days?
>   b. Termination of her contract?
>   c. Being mocked to other members of staff? Namely
>   i. Saying she went "on strike" in an email from Katie Voice to Naomi Rodgriguez on 18 May and in a Teams message from KV to Charlotte Guerney on the same day.
>   ii. Saying she had a "bit of a strop" in an email from KV to NR on 18 May.
>   iii. Saying she was "too much drama" in a Teams message from KV to Charlotte Guerney on 18 May."

5. On 15 July 2022, the claimant made a Subject Access Request to the respondent which was responded to on 8 November 2022 when copies of the documents were sent to her, including the emails and Teams messages which subsequently formed the basis for the amendment application. The documents were later disclosed to the respondent as part of her disclosure.

6. At the case management preliminary hearing held on 22 March 2023, she clarified the claims and issues before Employment Judge Tuck KC, which did not include victimisation. She had all of the documents at the time in support of making such a claim. We were told the Judge spent about two hours going through with her how she put her case against the respondent. The claims and issues were, therefore, agreed between the parties. In paragraph 7 of the Judge's orders the opportunity was given to the parties to write to the Tribunal by 28 April 2023, if they thought the claims and issues were wrong. The claimant did not raise any concerns.

7. The claimant argued that she was going through some traumatic events in her life, such as the loss of her son on 31 July 2022, and a few family issues. She was for a brief period of time represented by Stephensons Solicitors LLP, on a no-win no-fee basis, and thereafter, by her local Citizens Advice Bureau. She submitted that as a litigant in person her application to amend should be allowed.

8. Ms Bewley, counsel on behalf of the respondent, objected to the application and went through her written submissions.

The law

9. A party can apply to amend the claim or response at any time in proceedings, Selkent Bus Co Ltd v Moore 1996 ICR 836 and rule 29, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

10. Whether an amendment is required will depend on whether the claim form or response provides, in sufficient detail, the complaint or defence the party seeks to make. The mere fact that a box is ticked indicating a specific claim, such as direct race discrimination, does not mean that it raises a complaint of indirect race discrimination and victimisation. In considering whether the claim form contains a particular complaint that the claimant is seeking to raise, the claim form must be considered as a whole. The mere fact that a box is ticked indicating that a certain claim is being made may not be conclusive in determining whether it sets out the basis for such a complaint, Ali v office of National Statistics 2005 IRLR 201, Court of Appeal.

11. Sir John Donnaldson, in Cocking v Sandhurst (Stationers) Ltd and Another, 1974 ICR, in the National Industrial Relations Court, set down, generally, the procedure when considering whether to allow an amendment. His Lordship stated that Tribunals must have regard to all the circumstances, in particular, any hardship which would result from either granting or refusing the amendment. This judgment was approved in Selkent.

12. In Selkent, Mr Justice Mummery, President of the Employment Appeal Tribunal at the time, held that in determining whether to grant the amendment application, the Tribunal must always carry out a balancing exercise of all relevant factors, having regard to the interests of justice and to the relative hardship cause to the parties if the application is either granted or refused. The relevant factors are: the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

13. Whether the claim would be in time if the amendment is a new claim, is not determinative of the application to amend.

14. In Ahuja v Inghams [2002] ICR 1485, the CA held, Mummery LJ, that Employment Tribunals have the power to allow an amendment even at a late stage based on the evidence given at the hearing. They have a wide jurisdiction to do justice in the case and "…should not be discouraged in appropriate cases from allowing applicants to amend their applications, if the evidence comes out somewhat differently from was originally pleaded. If there is no injustice to the respondent in allowing such an amendment, then it would be appropriate for the Employment Tribunal to allow it rather than allow what might otherwise be a good claim to be defeated.", paragraph 43.

15. It may be appropriate to consider, as another factor, whether the claim, as amended, has any reasonable prospects of success, but the Tribunal should proceed with caution as evidence will be required in support of the amendment, Cooper v Chief Constable of West Yorkshire Police and Another UKEAT0035/06; and Woodhouse v Hampshire Hospitals NHS Trust EAT0132/12.

16. In the Presidential Guidance – General Case Management, issued on 22 January 2018, amending a claim or response falls within rule 29 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the power of the Tribunal to issue case management orders. "In deciding whether the proposed amendment is within the scope of an existing claim or whether it constitutes an entirely new claim, the entirety of the claim form must be considered.", paragraph 7.

17. "The fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment", sub-paragraph 11.1.

18. The test is the balance of injustice and hardship in allowing or refusing the application and should be approached by considering the practical consequences of allowing an amendment, HHJ Tayler, Vaughan v Modality Partnership UKEAT/0147/20, paragraph 21.

19. The balance of prejudice can include an assessment of the merits of the proposed amended claim, Gillett v Bridge 86 Ltd UKEAT/0051/17.

20. In relation to time issues, where the amendment is granted, time takes effect at that point and not at the date of the original claim form or the date of the application, Galilee v Commissioner of Police of the Metropolis [2018] ICR 667, a judgment of the EAT, paragraphs 67-68, HHJ Hand QC.

21. In the case of Mervyn v BW Controls Ltd [2020] EWCA Civ 393, the Court of Appeal, Bean LJ giving the lead judgment, held in paragraph 43:

> "It is good practice for an Employment Tribunal, at the start of a substantive hearing with either or both parties unrepresented, to consider whether any list of issues previously drawn up at the case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the ET should consider whether an amendment to the list of issues is necessary in the interests of justice."

Conclusion

22. We accept that a party can make an application to amend arising out of matters recently disclosed to them. We also acknowledge that they can make an application at any stage in proceedings.

23. We are not here concerned about the claims and issues not properly set out requiring the Tribunal's intervention, Mervyn v BW Controls Ltd, but whether the claimant had time to apply to add the victimisation claim and whether it is in the interests of justice to grant her application to amend?

24. This is a new claim and does not arise out of facts already pleaded.

25. In relation to timing and manner of the application, the relevant date is the time the application was made, that being, on 3 August 2023, five weeks prior to the liability hearing. The documents, however, were served on the claimant on 8 November 2022. She had to put her victimisation claim by 7 February 2023.

She waited six months. While we accept that she suffered the loss of her son in July 2022, she had time to seek legal representation. While sympathetic, no good reason was given for the delay in making the application on 3 August 2023.

26. She was legally represented by Stephensons Solicitors LLP, and more recently by her local Citizens Advice Bureau, yet no steps were taken after 8 November 2022 to make a timeous application to amend.

27. In relation to the cogency of the evidence, given the date of the email being 18 May 2022, the respondent would be required to enquire into the mental processes of those whom the claimant alleged have victimised her. We accept that the respondent would be required to obtain evidence to challenge the claim which would add to time and costs.

28. As regards the merits of the claim and new averments, do they have reasonable prospects of success, Cooper v Chief Constable of West Yorkshire Police and Another? This is difficult to determine at this stage as we did not hear any oral evidence. We are mindful that we should proceed with caution. We do not express a view on the merits of the proposed victimisation claim.

29. We have to consider balance of injustice and hardship. We accept that the prejudice to the respondent is that, if the application is allowed, it will have to spend time preparing its defences to the claim and will incur costs in so doing. It has already prepared its case in accordance with the claims and issues agreed at the case management preliminary hearing. The claimant had the opportunity to make her application in good time but did not do so. Further, she still has her public interest disclosure and harassment claims to be heard and determined.

30. The application is out of time, and it would not be just and equitable to extend time.

31. Taking all of the above into account, and the interests of justice, we have come to the conclusion that the balance of prejudice favours the respondent. We, therefore, refuse the application to amend.

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Employment Judge S Bedeau

31 October 2024

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Sent to the parties on:

4 November 2024

For the Tribunal: