EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001169/2024

Held in Glasgow in Chambers on 24 February 2025

Employment Judge P O'Donnell

Ms Q Zahid **Claimant**

Lloyds Bank PLC **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The claimant's application to amend dated 16 December 2024 is allowed.

2. The Tribunal directs that the respondent should provide a revised ET3 in response to the claimant's amendment, as so advised, within 7 days of the date of this judgment.

REASONS

1. The claimant has brought a range of complaints against the respondent under the Equality Act 2010 (EqA) and the Employment Rights Act 1996.

2. On 16 December 2024, the claimant made an application to amend her claim in the following terms (reference below to paragraphs is a reference to paragraphs in the revised grounds of complaint):

    a. At paragraph 21, the claimant adds an allegation that the conditional approval of a request for leave and comments made in relation to that amounts to harassment related to disability under s26 EqA.

i. The respondent consents to this amendment on the basis that it is a re-labelling of a cause of action that is already pled.

b. At paragraph 52 and 53, the claimant adds an allegation that she was "constructively" dismissed on 8 August 2024 and that this amounts to harassment related to disability under s26 EqA.

i. The respondent objects to this application on the basis that this is a new claim being raised out of time. It is said that the delay in bringing the claim is substantial.

ii. The claimant's new representative has made the submission that the date of termination in the amendment is in error and that the correct date of termination was 29 August 2024. It is accepted on behalf of the claimant that this new claim is out of time even with the later date but that the delay is less.

c. At paragraphs 54 and 55, the claimant adds the allegation that the delay in handling, and the outcome of, her grievance (including the appeal) amount to victimisation under s27 EqA.

i. The respondent does not oppose these new claims which were in time at the date of the amendment application.

3. The respondent also raises issues regarding the draft list of issues revised by the claimant as at 16 December 2024. In particular, they assert that certain of the issues set out matters which are not pled in the ET1 either as originally drafted or in the proposed amendment.

4. The Tribunal will deal with the amendment application first and then with the list of issues.

5. The unopposed elements of the application are granted. The issue in dispute is the new claim set out at paragraphs 52 and 53 of the proposed grounds of complaint.

6. The Tribunal has a general power to make case management orders which includes the power to allow amendments to a claim or response in terms of Rule 30.

7. The case of *Selkent Bus Co Ltd v Moore* [1996] ICR 836 confirms the Tribunal's power to amend is a matter of judicial discretion taking into account all relevant factors and balancing the injustice and hardship to both parties in either allowing or refusing the amendment. The case identifies three particular factors that the Tribunal should bear in mind when exercising this discretion; the nature of the amendment; the applicability of any time limits; the timing and manner of the amendment.

8. The Tribunal considers that it is appropriate to address each of the specific factors highlighted in *Selkent,* consider any other relevant factors and then take all of those into account in balancing the injustice and hardship to all sides.

9. First, there is the nature of the amendment. There is no argument that this is an entirely new claim of "constructive" dismissal under the Equality Act. However, the Tribunal does note that the matters which are said to give rise to the breach of contract relied on by the claimant are the same matters which make up the complaints of discrimination as originally pled.

10. The application does not, therefore, plead new facts or make new factual allegations. It simply raises a new claim based on those facts. This is important as the respondent is already on notice of the existing claims of discrimination and is preparing to defend those at the final hearing.

11. Second, there is the issue of the applicability of time limits. This arises because the opposed amendment seeks to add a new claim. It is not disputed that the application to amend was made outside the normal time limit regardless of which date is accepted as the date of termination.

12. There are, however, a number of caveats or qualifications in relation to the issue time bar that is relevant to the Tribunal's consideration.

a. The first caveat is that there are issues relating to the question of time limits that require to be resolved. For example, the new claims of victimisation have been lodged in time and the claimant seeks to argue that all the acts of alleged discrimination form an act continuing over a period. It is possible that any earlier act such as any "constructive" dismissal could be in time as part of an act continuing over a period.

b. The Tribunal is not in a position, at this time, to determine these issues. For example, whether the individual acts amount to an act continuing over a period requires an assessment of the evidence about each act in order to determine whether there is an ongoing and continuing state of affairs (*Hendricks v Metropolitan Police Comr* [2003] IRLR 96). The present hearing is not one at which evidence has been heard and so this is a matter which the Tribunal considers will have to be determined in due course.

c. The second caveat or qualification is that the Tribunal does have a broad discretion to hear a claim out of time under s123(1)(b) EqA. Again, this is not an issue which the Tribunal can determine at the present hearing given the need for evidence as to why the new claim was being lodged out of time.

d. The third caveat and qualification is that the fact that a claim lodged now would be out of time is not fatal to the application to amend (*Transport and General Workers Union v Safeway Stores Ltd* UKEAT/0092/07).

e. The fourth and final caveat in respect of time limits is that, if the amendment is allowed, the respondent is not deprived of the opportunity to raise the time bar defence and this defence (along with the issues relating to the questions of continuing act and the Tribunal's discretion to hear any claim out of time) can be determined subsequently (*Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634 and the more recent decision of *Douglas v North Lanarkshire Council* [2024] EAT 194).

13. Third, there is the factor as to the timing and manner of the application. The application was made shortly after the first case management hearing in this case and relatively early in the process.

14. This has to be balanced against the fact that, at the time the application had been made, the final hearing in this case had been listed for four days starting on 10 March 2025. There was, therefore, only a limited period of time for the respondent to prepare to defend any new claim being raised.

15. Having addressed the specific factors identified in *Selkent,* the Tribunal considered whether there were any other relevant factors.

16. The Tribunal was not being asked to assess the prospects of success at this hearing and did not consider that the merits of the case was a factor which should feature heavily (if at all) in its consideration given that there was a clear dispute of fact between the claimant and the respondent which required to be resolved after the Tribunal sitting in the final hearing had heard all the evidence.

17. Turning to the balance of injustice and hardship between the parties, the Tribunal considered that there would be a significant injustice and hardship to the claimant in refusing the application as this would mean that she would have no remedy in respect of the termination of her employment. This is not a case where the impediments to the amendment could be avoided by way of a fresh ET1 as the same issues (that is, time bar) would still arise.

18. Turning to the question of whether there is any injustice or hardship for the respondent, they would be facing a new claim which they had not faced previously. The respondent's objection is solely made on the basis of the delay in raising this claim. However, the respondent has not suggested that they would be prejudiced in their ability to defend this claim because of this delay. This is not surprising given that, as set out above, the matters giving rise to the claimant's "constructive" dismissal are all matters already being advanced as claims of discrimination and which the respondent is already preparing to defend.

19. The Tribunal considers that there is unlikely to be significant additional evidence needed by either side in respect of the allegation of "constructive" dismissal and this will be more a matter of submissions.

20. If the amendment is granted then the only potential prejudice (which would apply to both sides) is that there is a limited window for the respondent to lodge a revised ET3 in response to the amendment. However, this also applies to the unopposed amendment adding claims of victimisation and the respondent has not suggested any difficulty in doing so.

21. If there was a prejudice to parties in this respect then a lesser means of dealing with it would be to postpone and relist the final hearing to allow time for revisions to the ET3 and any additional preparation needed. Whilst this would delay matters, that would be less prejudicial than preventing the claimant from proceeding with the additional claim at all. It is a matter for parties and their agents as to whether they consider a postponement is necessary.

22. In these circumstances, taking account of all the matters set out above, the Tribunal allows the claimant's application to amend of 16 December 2024.

23. Turning to the case management issues that arise in the case, the Tribunal directs that the respondent should provide a revised ET3 in response to the claimant's amendment, as so advised, within 7 days of the date of this judgment.

24. In respect of the list of issues, the Tribunal agrees with the respondent that this should not contain matters which are not pled. A list of issues is not a substitute for proper pleadings and cannot be used to get claims into a final hearing by "the back door".

25. For example, there is no case of perceived disability set out in the ET1 as originally pled or in the amendment. The claimant's case is very clearly pled as one where she and her son are disabled persons under the Equality Act and that the respondent had actual or constructive knowledge of this. A case

of perceived disability is a very different matter which requires different evidence.

26. Similarly, the respondent is correct that the matters set out at paragraph 26y & z of the list of issues as disability harassment are not pled as such. They are only pled as acts of victimisation.

27. The list of issues must reflect the parties respective claims as pled and the issues identified above are not matters which should appear on the list of issues.

Employment Judge P O'Donnell

Date sent to parties **25 February 2025**