



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss. Sunitta Beadle

v HCUK Resourcing Limited

Heard by Telephone

On: 14 August 2020

Before: Employment Judge Wedderspoon

Appearance:

For the Claimant: In person

For the Respondent: Mrs. K. Parkinson, Solicitor

JUDGMENT

1. The Claimant's application to amend her case in the draft form, paragraph 1 dated 21 July 2020 is allowed.
2. The Claimant's application to amend her case in the draft form, paragraph 2 dated 21 July 2020 is refused.
3. The Respondent has leave, if so advised, to amend its Response by 11 September 2020 to reply only to the factual assertions contained in the amended case.

REASONS

4. By Claim Form dated 27 April 2020 the Claimant brought complaints of direct discrimination and harassment related to sexual harassment. The Claimant has now withdrawn her claims of direct discrimination. Before Employment Judge Brain at a Preliminary Hearing on 8 July 2020 the Claimant confirmed her claim was confined to the incident during the week commencing on 16 December 2019 only and that events between January and June 2019 were by way of background. In the course of the discussion with the Judge, the Claimant sought to amend her claim so that harassment between January 2019 and June 2019 referred to in the claim form as "background matters" (paragraph 1 of the proposed amendment) and adding a further new

complaint (paragraph 2 of the proposed amendment). In the circumstances that the Claimant had not made a formal application prior to the hearing she was given time to make an application in writing. The Claimant so applied on 21 July 2020 and clarified she additionally sought to add a further harassment allegation relating to sexual orientation dating October/November 2019 when she says Ms. Longman asked her in front of staff in the office, when was the last time she had sex.

5. On 13 August 2020, the Respondent submitted detailed written submissions opposing the Claimant's application.
6. In the course of the telephone hearing both parties were given an opportunity to amplify their submissions.
7. For the Claimant she regretted that she had included paragraph 1 of her draft application as mere background in the pleaded ET1 because she saw them as out of time. In reality she believed that they formed a part of a series of events of discriminatory conduct towards her. In respect of paragraph 2, the Claimant accepted that she had not at the time put in a grievance. She believes H.R. at the Respondent was aware about this. She also raised a concern about paragraph 27 of the Respondent's letter dated 13 August 2020 which she believed was incorrect. Her recollection is that Employment Judge Brain had expressed the provisional opinion that one discriminatory comment may be in the mid band of Vento.
8. The Respondent submitted that all the circumstances should be considered and in particular the hardship to the Respondent. The points relied upon to oppose the application were significant hardship to the Respondent, the amendment placed the Claimant on an unequal footing to the Respondent, and the amendments added costs. The Respondent relied upon the Claimant's concession made in the hearing that paragraph 1 was out of time and that's why it wasn't included. As for paragraph 2, the Claimant had ample time to raise this and did not. The Respondent conceded that the same witnesses were likely to be dealing with the "background" allegation (paragraph 1 of the proposed amendment) in evidence in any event. In respect of paragraph 2 of the proposed amendment, this allegation has taken the Respondent by surprise. From the Respondent's investigation into this matter since it was raised in the application letter, the context was a jovial conversation between the Claimant and a colleague she found attractive. The allegation was undated despite the Claimant saying the event had a significant effect on her. The Respondent stated there is a gap of 4 to 5 months between paragraph 1 and 2.
9. The Claimant stated she could not recall if she told her team leader about paragraph 2 but she should have raised it in hindsight as a grievance.
10. In deciding whether to exercise its discretion to grant leave to amend, the Tribunal takes account of the principles set out in **Selkent Bus Company Limited v Moore (1996) ICR 836**; **Cocking v Sandhurst (Stationers) Limited NIRC 174**; and **Kutnetsov v The Royal Bank of Scotland PLC (2017) EWCA Civ 43**, the Presidential Guidance, General Case Management (Guidance note 1) and the overriding objective in Rule 2 of the Employment Tribunal (Constitution and Rules) of Procedure Regulations 2013, Schedule 1. The discretion to allow an amendment is a wide one but should be exercised in a way which is consistent with the requirements of relevance,

reason, justice and fairness consistent in all judicial decisions. The Tribunal should consider the nature of the amendment (is it an addition of factual details to an existing allegation or a new cause of action); the applicability of time limits (if lodging a new claim has time expired); the timing and manner of the application. It is also important to remember that the principles in **Selkent** are not an exhaustive list or approached in a tick box fashion (see paragraph 20 of **Kuznetsov v The Royal Bank of Scotland Plc** which refers to paragraph 47 of Lord Justice Underhill's judgment in **Abercrombie v Aga Rangemaster Limited (2013) EWCA Civ 1148**).

The nature of the amendment

11. The Tribunal finds that the Claimant's proposed amendment at paragraph 1 is not a wholly new cause of action but amounts to the re-labelling of factual background information already contained in the claim form and seeking to pursue this as an additional act of harassment related to sexual orientation. This matter had previously been brought to the attention of the Respondent by the Claimant by way of a grievance. The proposed amendment at paragraph 2 is a wholly new cause of action and is a significant amendment. There is no dispute that this matter did not form any part of a formal grievance raised by the Claimant. I agree with Employment Judge Maidment's comments in the letter dated 30 July 2020 which states *"..Her application to amend involves the addition of 2 harassment complaints related to sexual orientation. The first is already covered in her original grounds of complaint albeit labelled as background. The second appears not to have been raised before and the Tribunal notes that the Claimant had not explained her delay in raising it.."*

The applicability of statutory time limits

12. The applicability of the relevant time limit is an important factor but it is not determinative. The Claimant's claim was presented on 27 April 2020. The Claimant had included at this stage by way of background paragraph 1 of her proposed amendment but paragraph 2 was not so mentioned. The Claimant states that she had not originally included paragraph 1 as a claim because she believed it was out of time. There was no further explanation as to why paragraph 2 had not been pleaded at all. The Respondent has indicated that there is a gap between paragraph 1 and paragraphs 2 and the presently pleaded cause of action. On the face of it both proposed amendments are potentially out of time. Paragraph 1 was always known to the Respondent; it formed part of the Claimant's grievance and was pleaded as background. Due to the fact sensitive nature of the claims, at trial the Claimant may be successful in arguing it is just and equitable to extend time or that it forms part of a series of acts of discrimination or a continuing act. **Hendricks v Commissioner for the Metropolis (2002) EWCA Civ 1686** emphasised the need to focus on the substance of the complaints when assessing whether they form a continuous act. In reality that can only be justly decided hearing all the evidence. I therefore weigh all these matters in the balance.

The timing and manner of the application

13. It is a relevant factor to consider whether an application is made in a timely manner but again it is not a conclusive factor. The Claimant's application to amend was made at the Preliminary Hearing on 8 July 2020 when the proceedings were at an early stage. She formalised this promptly by written

application dated 21 July 2020. The Respondent has had time to consider its response and has provided a detailed letter of objections.

Balance of hardship

14. Proceedings are at a preliminary stage. The Respondent is calling a witness/witnesses to address background matters relied upon by the Claimant in paragraph 1 of the proposed amendment in any event. The amendment to allow paragraph 1 does not increase the length of trial hearing. The Respondent requested an additional day of hearing time following an application that the proposed trial date falls outside term time so it is difficult for witnesses and operational reasons and that the new case may take further time. I am mindful that the Claimant is a litigant in person conducting her case via CVP and that 2 days as a listing of the original claim may have been a little short in the circumstances. I do not see of itself that paragraph 1 increases the length of time particularly as the Respondent was calling the same witnesses to deal with it as background.
15. Paragraph 2 is a new matter not previously referred to in the ET1 at all nor in a grievance raised by the Claimant.
16. The balance of prejudice falls in the Claimant's favour with regard to amending her claim to allow paragraph 1 which is relabelling background as a cause of action.
17. The balance of prejudice falls in the Respondent's favour with regard to the proposed amendment of paragraph 2 because this matter is completely new and has not formed a complaint by the Claimant throughout the grievance process. In those circumstances I allow the proposed amendments of paragraph 1 but not paragraph 2.

Conclusion

18. In all the circumstances I allow the Claimant's amended claim form in the proposed draft paragraph 1 dated 21 July 2020 and give leave to the Respondent to amend its Response (if so advised) to reply to the factual assertions now made by the Claimant.
19. The Claimant raised some concerns about paragraph 27 of the letter of objection from the Respondents which opposed the Claimant's amended schedule of loss. The Respondent stated that Employment Judge Brain had said that one comment could not fall into the mid band of Vento. The Claimant disputed this and this was not her recollection. Unfortunately, I do not have the notes of Judge Brain's hearing before me so I am unable to deliberate on that point. In any event, the Claimant has put forward her valuation of her injury to feelings award. I explained the value of an injury to feelings award is dependent upon a Claimant succeeding in a claim of discriminatory harassment and the facts determined by the Tribunal. The Respondent was ordered to provide a counter schedule.

Employment Judge Wedderspoon

Date: 14 August 2020