



EMPLOYMENT TRIBUNALS

Claimant: J Isidore

Respondent: WAC Arts

Heard at: London South Employment Tribunal by video

On: 4 and 6 July 2023

Before: Employment Judge Burge

Appearances

For the Claimant: In person

For the Respondent: Mr D Brown, Counsel

JUDGMENT ON APPLICATION TO AMEND

Applications

1. The Claimant's application to amend her claim to include a claim of sex discrimination is refused.

REASONS

2. The Claimant brought her claim for constructive unfair dismissal, race and disability discrimination on 25 March 2022. At a Preliminary Hearing on 14 February 2023 the Claimant requested permission to amend her claim to one of sex discrimination. That was allowed for complaints she had already complained as race discrimination, as long as the acts of less favourable treatment were the same. But the Claimant had to make an application in writing setting out the full details of the order sought if she wanted to include new allegations of discrimination not contained in her claim form.
3. The Claimant provided the details of the proposed amendment on 1 May 2023. She said that she was comparing the way that her colleague had been treated on 14/11/2020 when she reported an intruder on the premises with the way that she

had been treated when she complained about her “safety concerns regarding after hours working, risks to [her] safety and managing the presence of intruders”. The Claimant provided the following extracts from emails in support of her application.

4. The email from her colleague:

“ Sat 14/11/2020 09:32...

Hash and I spotted a dodgy guy hanging around the atrium at 9am, he then managed to get in the Atrium and started to head round the reception desk and he looked as though he was casing it out. But then I radioed Hash and he ran into the toilets and then eventually left. He spent a bit too long in the toilet, which was weird, but Hash knocked on the door and then we just waited for him to leave.

And so, it’s been dealt with, but we thought we should email people to let them know.

Thanks,”

5. The response to her colleague’s report of an intruder was:

“...Thanks Hash and Tom, good work. Marian, could you bring any CCTV we have of this man together for me on Monday please?”

6. Around a year later, on 31/10/21, the Claimant says that she reported to her Line Manager her safety concerns regarding after hours working, risks to her safety and managing the presence of intruders:

*“Sent: 31 October 2021 13:35
...Subject: Lone Working*

...I have noted that I have been assigned late working hours on Tuesday 9th November and Friday 12th November. In view of there being no formally agreed safety measures for lone working on site, I am requesting that I am not assigned any shifts late into the evening or at any time where I will be required to work on my own, with access to the building open to the general public.

At present, Building Services have only one person working into the late evening. This means that there is currently a risk to FOH staff in the event that intruders enter the building. As I have previously mentioned, I have managed a few instances where people suffering from homelessness, excess alcohol and/or drug use and mental illness have entered the Main Reception area. Building Services have been out of reach on the Walkie Talkie system during these incidents. In light of the violent incident at Fambula Gardens in the Summer, when police had to be called, I think it’s time that this matter was addressed properly...”

7. The Claimant said that the response on 01/11/21 dismissed her concerns outright and called her account of events into question, stating the following:

“...You say 'at present Building Services have only one person working into the late evening', this has always been the case. The risk has not

increased, the addition of the restaurant/bar has in fact decreased the risk factor as there are now Fambula staff and patrons in the building, making it less isolated than it could previously be... You reference 'In light of the violent incident at Fambula Gardens in the Summer, when police had to be called', there was no such incident..."

8. The Claimant said that she challenged this response and requested an apology but the manager refused to apologise falsely stating again that security was onsite, provided by Fambula Garden, and mistakenly stating that adequate safety measures were in place.

The Law

9. The tribunal has a discretion to allow applications to amend. In *Selkent Bus Co Ltd v Moore* [1996] ICR 836, Mummery J, gave guidance as to the main factors that need to be considered when considering an application to amend. This guidance, which has itself been explained in subsequent case-law identifies the following key-factors:
 - 9.1 Nature of the proposed amendment;
 - 9.2 Timing and manner of the application to amend;
 - 9.3 Applicability of time limits;
 - 9.4 The balance of hardship.
10. In *Vaughan v Modality Partnership* [2021] IRLR 97, HHJ Tayler said this:

14. Underhill LJ 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 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.

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.”

11. In *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132, the EAT has held that, when considering whether it was just and equitable to extend the time limit for presenting discrimination complaints, or to grant an application to amend to add a further out of time discrimination complaint, the tribunal was entitled to weigh in the balance its assessment that the merits of the proposed complaints were weak.
12. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states:

“The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”

Conclusions

13. The Claimant had put in a lengthy narrative attached to her claim form. The interaction in question here is named as one of the reasons why the Claimant considered herself constructively dismissed. Further, there are some security and lone working considerations in her claim form, she has existing claims for harassment related to disability in relation to those and so while she will suffer some hardship if this amendment is not allowed, she has similar claims proceeding. However, it does not say in her claim that her security and lone working concerns were rejected because she is a woman. This proposed amendment is brought out of time. The Claimant says that she was unwell at the time she put in her claim but I note that she was well enough to enter a long narrative attached to her claim form.
14. The email extracts that form the detail of her application to amend do not, on the face of them, show that she is being treated badly because of her sex. The reporting of an intruder is very different to concerns being raised about lone working, even though they do include concerns about intruders. I asked Ms Isidore to explain to me why this was discrimination based on sex and her response was that because both mentioned intruders and that there was a difference in response and a difference in treatment this was sex discrimination. I do not agree. *Madarassy* is clear that there has to be more than a difference in treatment and a difference in protected characteristic. The Claimant did not identify what that could be. The way the proposed amendment was drafted and explained to me indicates that there is no or little prospect of success. I take that into account when deciding on the balance of injustice and hardship – it is not fair for the Respondent to be faced with a late amended claim that has little merit.

15. For these reasons the Claimant's application to amend is refused.

EJ Burge

6 July 2023

Sent to the parties on:

6 July 2023

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For the Tribunal Office:

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