EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106968/2020 (V)

Preliminary Hearing held remotely on 6 April 2021

Employment Judge A Kemp

Miss R Brindley **11 Tillycairn Place** **Ormiston Crescent** **Dundee** **Angus** **DD4 0UG**	**Claimant** **Represented by:** **Ms C Curran,** **Friend**
Zara UK Ltd **Lumina House** **89 New Bond Street** **London** **W15 1DA**	**Respondent** **Represented by:** **Ms K Parker, Barrister** **Instructed by:** **Ms A Nevins, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The provision by the claimant of further particulars of the claims she makes in her email of 2 February 2021 is an amendment, and that amendment is allowed.

REASONS

Introduction

1. This was a Preliminary Hearing for the purposes of addressing arguments as to amendment. The claimant is represented by Ms Curran, a friend, and the respondent by Ms Parker, a barrister.

2. A Preliminary Hearing was held on 13 January 2021, following which Further and Better Particulars were provided by the claimant. A second Preliminary Hearing was held before me on 26 March 2021, after which the present hearing was fixed.

3. The hearing was held remotely by Cloud Video Platform.

Respondent's submission

4. The following is a basic summary of the submission made by the respondent. The ET1 had set out 12 allegations. The issue at the first Preliminary Hearing had been what had been alleged, for what claim. The particulars provided on 2 February 2021 set out different allegations from those in the ET1. The respondent had prepared a table of the new allegations, with 16 paragraphs setting out the aspects that were contested by the respondent, each of which Ms Parker referred to.The respondent had also prepared a table for what was referred to as the old allegations, being those arising from the terms of the Claim Form. For the majority of the "new allegations" she argued that there was nothing in the Claim Form which referred to them, and for those that did have some form of reference, such as in relation to the claimant's sister, she argued that it was acceptable only as background and not as a new factual claim. Some matters she argued were not factual allegations against the respondent, but referred to communications the claimant had had, for example, with others. The Claim Form had been very lengthy. It was not appropriate to add more allegations because they fitted within the broad heading of discrimination. Permission to add additional facts was required, and should not be granted. The respondent would suffer hardship in investigating matters, some going back to 2017, and out of time. The claimant had had an ample opportunity to submit the facts in the Claim Form. Ms Parker addressed each of the 16 paragraphs, and save in respect of paragraphs 2 and part of 11 submitted that there was nothing in relation to them in the Claim Form. Permission to add them should not be given. No authority was cited in the submission.

Claimant's submission

5. The following is again a basic summary of the submission made by the claimant. Ms Curran said that the respondent argued at times that the Claim Form was detailed, and at others that it was not. It was not unfair to refer to the matters, and they were inextricably linked as continuing acts. The Judge in the first Preliminary Hearing had said nothing to exclude providing additional particulars. Reference was made to the agenda return by the claimant, sent to the respondent and Tribunal. The enquiries about them would be the same as for those in the Claim Form. There would be injustice and hardship to the claimant if she was not allowed to particularise her allegations. The document attached to the Claim Form gave background, and matters in the particulars provided had been discussed at grievance meetings. The claimant had not objected to the late receipt of the Claim Form, and had not yet received the contract of employment which should have been sent. The respondent should not be permitted to object. No authority was cited in the submission.

The law

6. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to address that, save in respect of additional respondents in Rule 34. Whether or not particulars amount to an amendment requiring permission from the Tribunal to be received falls within the Tribunal's general power to make case management orders set out in Rule 29 which commences as follows:

> "**29 Case management orders**
> The Tribunal may at any stage of the proceedings, on its own initiative or on application to make a case management order…."

7. Rule 29 requires to be exercised having regard to the overriding objective in Rule 2. It states as follows:

> "**2 Overriding objective**
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
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> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
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> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

8. Earlier iterations of the Tribunal Rules of Procedure did contain a specific rule on amendment, and the changes brought into effect by the current Rules, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, require to be borne in mind when addressing earlier case law.

9. The nature of the exercise of discretion in amendment applications was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. In that case the application to amend involved adding a new cause of action not pled in the original claim form. The claim originally was for unfair dismissal, that sought to be added by amendment was for trade union activities. The Tribunal granted the application but it was refused on appeal to the EAT. The EAT stated the following:

> "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.

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 additions 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, eg, in the case of unfair dismissal, s.67 of the 1978 Act.

(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 Rules 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."

10. In ***Harvey on Industrial Relations and Employment Law*** Division PI, paragraph 311, it is noted that distinctions may be drawn between firstly

cases in which the amendment application provides further detail of fact in respect of a case already pleaded, secondly those cases where the facts essentially remain as pleaded but the remedy or legal provision relied upon is sought to be changed, often called a change of label, and thirdly those cases where there are both new issues of fact and of legal provision on which the remedy is sought, of which ***Selkent*** is an example.

11. The first two categories are noted as being those where amendment may more readily be allowed (although that depends on all the circumstances and there may be occasions where to allow amendment would not be appropriate). ***Pruzhanskaya v International Trade & Exhibitors (JV) Ltd UKEAT/0046/18*** falls within the first category. The claimant had brought a claim for unfair dismissal in time and subsequently applied to amend his claim to include an allegation that he had been dismissed for making a protected disclosure. The employment tribunal had rejected this application on the basis that it would entail the introduction of 'a substantial new issue which plainly is brought considerably out of time' and would cause prejudice to the respondent employer. An appeal was allowed on the basis that an application to amend an existing complaint of unfair dismissal to allege the new reason, which would be automatically unfair, did not involve bringing a new complaint outside the time limit. For the claimant to amend his claim to include the argument that his dismissal was unfair automatically on that basis was not to bring a new claim as it 'is simply a form of unfair dismissal'.

12. The third category was noted to be more difficult for the applicant to succeed with, as the amendment seeks to introduce a new claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time.

13. The present case is in the first category. It seeks to add new matters of fact, as pleading, to a case already pleaded without adding any new cause of action. These categories are not however strictly separated, and case law on amendment for other categories may provide helpful guidance. Ultimately, the decision on whether or not to allow an amendment is one for the exercise of discretion, having regard to all the circumstances but in particular to the hardship and injustice suffered by either party.

14. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said this in relation to an amendment which arguably raises a new cause of action and therefore in the third category, suggesting that the Tribunal should

> " … focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

15. In order to determine whether the amendment amounts to a wholly new claim and in the third of the categories set out above it is necessary to examine the case as set out in the original Claim to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v Bryant [1999] ICR 123***). In that case the claimant made no reference in her original unfair dismissal claim to alleged victimisation, which was a claim she subsequently sought to make by way of amendment. The Court of Appeal rejected the amendment on the basis that the case as pleaded revealed no grounds for a claim of victimisation and it was not just and equitable to extend the time limit. It said that the proposed amendment

> "was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time".

16. Section 123 of the Equality Act 2010 provides as follows in regard to time limits for discrimination claims such as those under sections 13 or 26 of that Act

> "**123 Time limits**
>
> (1) [Subject to [sections 140A and [section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—
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> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

17. This therefore provides that the Tribunal has jurisdiction under the 2010 Act if a claim is commenced within three months of the act complained of, but there are two qualifications to that, firstly where there are acts extending over a period when the time limit is calculated from the end of that period, and secondly where it is just and equitable to allow the claim to proceed.

18. The assessment of what is just and equitable involves a broad enquiry with particular emphasis on the relative hardships that would be suffered by the parties according to whether the amendment is allowed or refused.

19. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time, and the exercise of discretion is the exception rather than the rule (***Robertson v Bexley Community Centre [2003] IRLR 434***), confirmed in ***Department of Constitutional Affairs v Jones [2008] IRLR 128***

20. No single factor, such as the reason for delay, is determinative and a Tribunal should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of

success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***.

Discussion

21. There is no formal Rule as to amendment, still less any formal classification between a change to the pleadings which provides further particulars of a claim already pled, and one that falls to be considered as an amendment. I consider however that where there are new allegations of fact which are sought to be added by further particulars and that is disputed, as is the case in this claim, that does amount to an application for an amendment.

22. The next issue is whether it was competent for the claimant to seek to add further facts beyond those in the Claim Form. The respondent argued that the first Preliminary Hearing sought clarity on what facts were relevant to which claims, rather than give the claimant an opportunity to add facts. Whilst the Orders issued after that hearing are in the context of giving that clarity, based on what had been set out in the Claim Form, I do not consider that there was anything incompetent in the claimant seeking to add additional facts to her Claim when doing so. I consider therefore that there is no issue of competency that means that I cannot consider whether to allow the amendment proposed. Whether or not to allow it is a matter for discretion.

23. In exercising that discretion regard is had to the terms of the overriding objective, in particular the interests of justice. I take into account that the claimant is represented by a friend who is not legally qualified.

24. The matters referred to in ***Selkent*** provide anon-exhaustive structure to consideration of the dispute. The first is the nature of the amendment. The original pleading was in a narrative form, not easy to follow in places, such that it was not easy to determine what claims were made, and what facts were relied on for the claims. The claimant provided on 2 February 2021 further particulars of her claim. In doing so she did not exactly follow all aspects of the Order, but she did so as far as she could, given the constraints of a representative who was not legally qualified. I consider that what was provided substantially complied with the Order, and then

went further than that by adding in some factual particulars which had not been specifically set out earlier. I note that the Claim Form had a reference to a paper apart which then had 24 paragraphs, which included reference to allegations of fact using phrases such as “for instance” and “such as”. These words indicate that the alleged events referred to were not exhaustive. To use the phrase in ***Bryant*** the further particulars expanded on those pleadings. They did so in the context of claims already pleaded, adding no new legal claims. There were in some instances new allegations, or averments to use the term from Scottish practice, but they were very closely connected with the original allegations from the Claim Form. They would involve very substantially similar areas of enquiry, using the term in ***Abercrombie.*** The later authority of ***Pruzhanskaya*** involved the introduction by amendment of facts not pled originally, particularly in relation to protected disclosures, and doing so was allowed as it fell within the overall cause of action of unfair dismissal, even where it was automatically so. The present case is more simple, remaining squarely within the framework of the causes of action originally pled in the Claim Form. Whilst formally there are not three categories of case as referred to above, the case law does indicate that expanding on facts originally pled for a cause of action originally pled may generally lead to permission to amend being granted. These factors, and the three authorities referred to, in my judgment favour the granting of the application.

25. The second is time-limits, a point of particular relevance if adding a new cause of action, not present in this case. I do not consider that an issue of timebar arises directly, as no new legal claim is made (a view supported in ***Harvey*** at paragraph 312, although the facts of the cases there referred to are different to the present case), but proceeding on the basis that such an issue does, or may, arise from pleading new facts there is an allegation that there was both harassment by Ms Russell, and direct discrimination by the respondent, and in each case there is alleged to have been conduct extending over a period. Whether or not that was so is entirely dependent on the facts when found, but it is at least possible that there was conduct extending over a period for the purposes of section 123 of the Equality Act 2010, that that period ended within the statutory time limit extended by the provisions as to early conciliation, and that the alleged facts are not

therefore brought out of time. A decision on that can be made, if necessary, following the hearing of all evidence, reserving the issue of jurisdiction (***Galilee v Commissioner of Police of the Metropolis [2018] ICR 634*** **).** Separately, there is the issue of whether it would be just and equitable to allow the matters to be raised under that section, and in all the circumstances I am satisfied that there is a strong argument that it is. The issues are very closely related to the matters alluded to or mentioned specifically in the Claim Form. The issue of hardship I address below, and substantially favours the claimant. The absence of a substantial issue over time-limits means that this is not a factor that favours refusing the application.

26. The third is in relation to the timing and manner of the application. It was made relatively early in the process, with dates for a Final Hearing not yet fixed, but likely to be for the late summer at the earliest, and that remains the position at the time of this Judgment. Whilst the Orders from the Preliminary Hearing did focus on seeking clarity from the original set of pleadings in the Claim Form, for the reasons I have found that did not prevent the claimant from seeking to add additional detail, and it was not incompetent to have done so. As already stated her representative is not legally qualified. That also favours the granting of the application in my judgment.

27. Two other matters require consideration. The first is that the claimant argued that the issues she sought to particularise had been mentioned in the agenda return she sent, and earlier in grievance hearings. These are not documents which contain pleadings, but in considering the matter in the exercise of discretion if (and I have not seen the documentation) a matter was referred to in a grievance hearing, and that grievance itself referred to in the Claim Form, a causal link between them may exist. I have not however been able to ascertain that in the absence of sight of the documents such as grievance letters or emails, notes of hearings, and decision letters or emails.

28. The second is that I consider that the degree of hardship and injustice to the respondent by the addition of such allegations not set out in the Claim Form but falling within the overall ambit of the causes of action originally

pled is limited, and substantially outweighed by the hardship and injustice that there would be to the claimant of refusing her permission to rely on the matters she seeks to.

29. It is true, as the respondent submitted, that further allegations will require additional investigation. Further investigation of some kind may in any event be required as the respondent accepts that some of the further particulars do arise from the original pleadings. It is also true that in some of them the connection with an allegation made against the respondent is not direct, or it may relate more to the views or perception of the claimant, but particularly in the claim as to harassment it is not possible at this stage to say that they are not potentially relevant, for example to the issue of an environment under section 26(1)(b)(ii) of the Equality Act 2010, if held to have occurred as the claimant alleges. The extent of enquiry required by the further particulars however is not likely to be unduly burdensome, it covers periods of time referred to in the Claim Form, and is likely to involve speaking to the same witnesses. The hardship and injustice on the respondent is therefore in my judgment limited.

30. If the amendment were to be refused I consider that the hardship on the claimant would be greater. In the claims of direct discrimination and harassment the claimant should be entitled to refer to those facts she considers relevant, and making decisions on those primary facts may be relevant both to whether or not the burden of proof shifts to the respondent in any respect, and as to the drawing (or not) of inferences from primary facts. Allowing the Tribunal to hear all the evidence a party wishes to refer to will assist it in reaching its decision at the Final Hearing. It is in the interests of justice to hear all relevant evidence before making a decision on issues such as whether an act was because of the claimant's gender reassignment for the purposes of claims under sections 13 or 26 of the Act, and whether what occurred created an environment that falls within the provision referred to above.

31. Taking all of these matters into account, I consider that it is in accordance with the overriding objective to allow the particulars to be received as an amendment to the Claim Form.

Conclusion

32. I accordingly allow the amendment.

33. I would also record that in light of the time taken to address these issues, and that the claimant may wish to refer to comparators for the matters now permitted to be included, it was agreed that:

    (i) The time for the respondent to respond as to comparators be extended to 4 May 2021, and that an amended Response Form be submitted by that date
    (ii) The date for exchange of documents be extended to 1 June 2021
    (iii) The date for preparation of the Bundle be extended to 15 June 2021
    (iv) The date for exchange of witness statements be extended to 13 July 2021

34. As these matters were agreed between the parties, and recorded above, I did not consider that it was necessary to issue a formal amendment to the Orders given with the last Preliminary Hearing Note.

35. The claimant also confirmed that all of the facts she pled were relied on for her claim under section 13 of the Equality Act 2010, and that where in an email dated 1 April 2021 she had referred to there being no comparator for a particular matter, that was to be taken as a reference to a hypothetical comparator. Now that the particulars are received as an amendment which has been allowed, the claimant may wish to set out her position on the comparators relied on in those respects, as her email of 1 April 2021 appears to have dealt with the matters in the Claim Form only.

Employment Judge A Kemp

_____

Employment Judge

7 April 2021

_____

Date of judgment

Date sent to parties _____