



EMPLOYMENT TRIBUNALS

Claimant

Mrs P Elliott

Respondent

Barnet and Southgate College

v

PRELIMINARY HEARING

Heard at: Watford (by telephone)

On: 4 January 2021

Before: Employment Judge Alliott (Sitting alone)

Appearances:

For the Claimant: In person

For the Respondents: Mr James Bromige (Counsel)

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by telephone (T). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

JUDGMENT

The claimant's application to amend her claim is dismissed.

REASONS

1. Pursuant to the direction of Employment Judge Heal, the claimant's application to amend has been heard today.
2. The claimant's application to amend her claim was made on 27 April 2020. It relates to "ongoing post-employment victimisation". Although Mr Bromige took this to be an application in relation to further detriment for public interest disclosure, I have taken it as, and the claimant has confirmed is, an application in relation to s.27 of the Equality Act 2010.

3. In her email dated 27 April 2020 the claimant states:-

“The event took place between 30 April 2019 – 31 August 2019 when the respondent refused me access to a copy of the Nazars Report that I needed to appeal a false claim made against me at the High Court...”

4. The claimant then goes on to set out her complaints about the respondent’s case before the High Court.

5. In extensive discussion with the claimant today, it is agreed by the claimant that her application to amend her claim relates to a victimisation claim under s.27 of the Equality Act. The basic ingredients of the application are as follows:-

5.1 That the act complained of between the dates of 30 April and 31 August 2019 was the respondent’s failure to send to her an unredacted copy of the Nazars report;

5.2 that this was a detriment because it meant that her appeal against the judgment of Master Cook, dated 30 April 2019, was dismissed; and

5.3 the protected act relied upon was the bringing of these proceedings.

6. Under Rule 29 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, I have a broad discretion to allow amendments at any stage of the proceedings. In the exercise of my discretion I should seek to do justice between the parties having regard to the circumstances of the case. The key principle is that in exercising my discretion I must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it.

7. I must carry out a careful balancing exercise of all the relevant factor, three of which will include:

- The nature of the amendment;
- The applicability of time limits;
- The timing and manner of the application.

8. I should, when considering applications to amend that arguably raise new causes of action, focus:

“not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry 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.”

(As per IDS Employment Law Handbook “Practice and Procedure” at 8.27)

9. I first consider the nature of the amendment.

10. This is a new claim in relation to matters arising after the presentation of the ET1 claim form. As such, the amendment constitutes a new course of action based on new factual allegations. There is nothing in the rules that prevents such a claim being brought by way of amendment. Indeed, given the necessity for one EC certificate number, and on the basis that it is related to the original claims, so such a course of action is to be preferred to a second claim being made.
11. The dates of the proposed amendment are not without significance in that they clearly relate to the appeal period in High Court proceedings that were heard in 2018/2019. Apart from an interim injunction made on 31 October 2018, I have no documentation in relation to these High Court proceedings. Clearly, the respondent college issued proceedings in the High Court against the claimant for breach of contract. As part of those proceedings an interim injunction was granted by Deputy High Court Judge Rowena Collins-Rice requiring the delivery up and destruction of confidential information retained by the claimant.
12. The claimant told me that she defended those proceedings on the basis that she was entitled to retain those documents due to the fact that she had made whistleblowing allegations. Whether or not such a defence exists I do not know.
13. It would appear that the respondent college made an application for summary judgment.
14. The interim injunction return date and the application for summary judgment were both heard on 30 April 2019 in front of Master Cook. I am told that summary judgment was entered on behalf of the respondent college, the final injunction confirmed and costs awarded against the claimant. Hence a final determination by a court of competence has been made on that issue and I cannot go behind that decision.
15. The claimant appealed the decision of Master Cook. In particular, she sought to rely upon the Nazars report obtained by the respondent college. I am told that Nazars conducted an independent investigation into the claimant's whistleblowing allegation.
16. On 8 May 2019 a preliminary hearing was heard in front of Employment Judge Palmer in these proceedings. At that hearing the issues were defined and case management orders made. The claimant tells me that she raised the issue of disclosure of the Nazars report at that hearing and was told that she would have to wait until disclosure which was ordered for 5 August 2019.
17. The respondent college accepts that the claimant had been making numerous requests for the Nazars report since December 2018.
18. It would appear that the claimant's appeal sought to rely on the Nazars report as the claimant told me that the High Court indicated that it would like to see the Nazars report. The claimant told me that she told the High Court that she would provide it by 5 August. The claimant was unable to provide it by that date as she

did not have the Nazars report by then. Accordingly, the claimant told me that she contacted the Court and asked for an extension of time, which was granted until 12 August 2019. I do not know if the extension was couched in terms of an unless order. The claimant tells me that she contacted the High Court to ask for a further extension as she had not got the report but this was not dealt with.

19. Meanwhile, against the deadline of disclosure being required by 5 August, the respondent requested an extension to 12 August due to the volume of documents involved. Whilst that was neither consented to nor appears to have been decided by the tribunal, on 12 August the respondent college disclosed its documents, including the Nazars report in its list. On 30 August 2019 the claimant applied to the tribunal for an order that the Nazars report be disclosed and on the same date, no doubt in response to the claimant's application, a copy of the Nazars report was sent to the claimant by recorded delivery. The respondent also indicated that, pursuant to the rules of disclosure, the report could only be used in these tribunal proceedings.
20. Meanwhile, the claimant's appeal against the judgment of Master Cook in the High Court had been struck out due to the claimant failing to comply with an order to provide the Nazars report.
21. The dates of the proposed amendment run from the date of Master Cook's decision on 30 April 2019 until her realisation that her appeal had been struck out on or around 31 August 2019.
22. On any application to amend, an assessment of the underlying merits should be approached with caution. The Nazars report was not provided voluntarily by the respondent college in the High Court proceedings and no application was made in those proceedings for its disclosure. The Nazars report was listed in the claimant's disclosure list on 12 August and sent to the claimant on 30 August 2019. The respondent college is correct in saying that, having disclosed the Nazars report in these proceedings, it could not be utilised in the High Court proceedings. Whilst that may not have been known to the claimant, it is a fact. The claimant will have to establish that the non-disclosure of the Nazars report deprived her of the opportunity of appealing the order of Master Cook and that that was due to the fact that she had brought these proceedings. Further, that the Nazars report was relevant to the High Court proceedings. I merely observe that given the factual background and the reason for the striking out of the High Court appeal, she may face some difficulties in establishing those propositions.
23. This case was listed for final hearing on 30 March 2020. Due to the pandemic the hearing was converted into a preliminary hearing. Notwithstanding making four submissions as to case management orders required at that hearing, this application to amend was not made at that stage. It would appear that the claimant was in receipt of legal advice at that time.
24. In my judgment, the new cause of action and factual basis of the same will involve a very significant increase in the preparation required for this hearing. It will involve the investigation of the high court proceedings, the nature of the

claims made and the submissions made against the background of judicial decision making.

25. The application to amend is opportunistic in the sense that it is reliant upon the unavoidable adjournment of the full merits hearing. Other than this application to amend, I am told that the case is trial ready. Whilst in one sense the timing will not affect the hearing of the latter as it has had to be postponed, on the other hand, it is opportunistic due to the adjournment.
26. The claimant was aware of the facts upon which she bases this amendment on 31 August 2019. As such, the three month time limit for bringing her claim would have expired on 30 November 2019. The application to amend was only made on 27 April 2020, nearly five months late. The claimant has told me of difficulties relating to covid and the impact it has had on her family but in my judgment, that does not explain the delay in December, January and February. I have taken into account the fact that the claim being advanced is significantly out of time. I do not consider that it is just and equitable to extend time.
27. Balancing hardship, clearly there will be hardship to the claimant in losing a claim against hardship to the respondent in having to defend a substantially expanded claim in circumstances where this claim is already document heavy and complex.
28. Taking in to account all the circumstances and balancing the issue between the parties, in my judgment, it would not be fair and just to allow the proposed amendment. Consequently, the application is dismissed.

Employment Judge Alliott

Date: 29 January 2021

Sent to the parties on:

04 February 2021

For the Tribunal: