EMPLOYMENT TRIBUNALS

Claimant: Ms J Winter

First Respondent: Aneurin Bevan University Local Health Board
Second Respondent: Acacia Management Services Limited (in voluntary liquidation)

Heard at: Cardiff **On:** 17 September 2024

Before: Employment Judge Lloyd-Lawrie

Representation
Claimant: In person
Respondent: Mr James (Counsel)

RESERVED JUDGMENT

The Claimant's application to amend her claim to add claims of discrimination are refused.

The Claimant's application to amend her claim to add claims of whistleblowing are refused.

The Claimant retracted her application to amend her claim to add claims for "other payments" and thus no claim is added.

The Claimant's claim of unfair dismissal is struck out as the claim is presented out of time and no grounds to extend time exist. The Tribunal lacks jurisdiction to hear the claim therefore.

REASONS

Background to the claim

1. The matters before me today were set out in the Case Management Order of Employment Judge Evans and the notice of hearing. They were as follows:

a) Whether the Claimant should be permitted to amend her claim to include complaints of:

   i) Discrimination;
   ii) Whistleblowing; and
   iii) Other payments.

b) Whether the Claimant's complaint of unfair dismissal should be struck out against the First Respondent- was the Claimant an employee of the First Respondent, i.e. were they employed under a contract of employment?

c) Further, or in the alternative, whether the Claimant's claim for unfair dismissal is out of time:

   i) When was the date of dismissal, and
   ii) If the was outside of the timescales provided for of three months less a day, was it reasonably practicable to present the complaint of unfair dismissal within that time limit? If not, was it presented within a reasonable time period.

d) Case management generally.

2. I dealt with the potential strike out of the unfair dismissal claim as against the First Respondent first. The Claimant conceded that she was never employed by the First Respondent but instead was an agency worker, supplied and employed by the Second Respondent, though a third agency who acted as the interface between the two respondents. The Claimant chose to withdraw the claim of unfair dismissal as against the First Respondent only and consented to it being dismissed upon withdrawal.

3. Before looking at the amendment application, I think it important that the timeline in this case is recorded. I find that the Claimant, by way of a claim form presented (albeit not in a form that could be immediately admitted) received on 26/10/2023, sought to issue a claim of unfair dismissal against the First and Second Respondent.

4. The Claimant, by way of letter from the Tribunal, dated 21/01/2024 was asked to provide the identity of her employer and the date of termination of her employment.

5. The Claimant responded the same day (21/01/2024) stating that her Employer was the Second Respondent and that Just Nurses was the company who "does business though acacia management". She advised that her P45 was sent to her in August 2023 and that her suspension began on 20/05/2023. On that email, the Claimant provided other information and did state "This is to do with datixing and whistleblowing".

6. The Claimant was sent an email from the Tribunal, dated 27/02/2024 asking her to confirm her address by 4/03/2024. The Claimant responded the same day (27/02/2024) proving her address.

7. The Claimant's claim was then rejected by the Tribunal on 11/03/2024.

8. The Claimant sent a new ET1, only sent by email direct to the Wales Employment Tribunal, on 20/03/2024. This gave her employment end date of 18/05/2024 and for section 8, ticked the sections for unfair dismissal, religion or belief (belief being underlined) discrimination, whistleblowing and "other payments".

9. The Tribunal received a letter from the Claimant on 21/03/2024, asking for a reconsideration of the decision to reject her first claim. At the same time, an appeal was made to the Employment Appeals Tribunal.

10. The Claimant then sent another email dated 26/03/2024 stating that Acacia Management sent her P45 to her on 1st August 2024 and that they stopped trading October 2023 and were taken over by Umbrella Union in November 2023.

11. The Tribunal reconsidered the decision and the Claimant's ET1 was accepted from 27/2/2024, the date she remedied the breach.

12. The Tribunal advised that the second claim was not accepted and listed a case management hearing on 17/06/2024.

13. During the case management hearing on 17/06/2024, the Claimant was made aware that she would need an application to amend her claim if she was minded to add other claims. She was advised that any application must be served by 19/07/2024 and set out exactly what the application must include. She was also directed to the Presidential Guidance and the decisions on **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650** and **Selkant Bus Co Ltd v Moore [1996] ICR 836**.

14. The Claimant posted the application to the Tribunal and it was received on 17/07/2024.

15. The First Respondent, who duly served an ET3 in date, opposes the amendments stating that they are new claims, could and should have been brought in time and that there would be undue prejudice to them in allowing them at this stage. They have also made the point that the claims are incomprehensive in terms of fact and law.

16. The Second Respondent who are in voluntary liquidation have stated that they will not be defending the claim.

Findings on amendments

17. I have first directed myself to the guidance from the case of **Cocking v Sandhurst (Stationers) Ltd** and **Selkent Bus Co Ltd v Moore 1996** . The key principle from these cases is for the Tribunal, when exercising their discretion, must have regard to all the circumstances in the case and in particular and injustice or hardship which would result from the amendment or refusal to make it. The case of **Vaughan v Modality Partnerships 2021 ICR, 535, EAT** restating again that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application.

18. I have also borne in mind the guidance of Mr Justice Langstaff in **Chandhok v Tireky 2015 ICR 527, EAT** where he was clear that an ET1 is not a place holder document in that it is not there "just to set the ball rolling". It is to set out the essential case. He also stated "it is to that which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made- meaning, under the [Tribunal Rules], the claim as set out in the ET1". The case then goes on to stage that a Claimant cannot expect other claims to be added, unless a formal application is made and that a Claimant should not assume that it would be granted.

19. I have also kept in mind the overring objective at all times.

20. The first stage of the any such application is to identify what amendments are being sought. This was not clear. When first asked what the protected characteristic the Claimant sought to rely upon for the discrimination claim, she advised "whistleblowing". After a further explanation by myself and direction to the very large bundle, the Claimant advised that she was claiming that her protected characteristic is that she believes in the Hippocratic Oath, the duty of candor and the duty of care.

21. The Claimant was asked to explain what discrimination claims she was bringing. It was not clear from her application as that appeared to be referring to her being treated in such as way due to raising concerns about "datixing". She advised that she was bringing a claim of harassment. When asked what she was saying was the unwanted conduct, she advised that it was being called into the office and spoken to multiple times. When asked for details, she first gave an incident from September 2021. This was not in the amendment request but was in her "reflections " notes that were part of the bundle. When it was put to the Claimant that her application to amend highlights September 2022 onwards, a further discussion was had. In summary, the Claimant latterly said that her harassment claim in fact only had 2 allegations of harassment, that being the suspension in May 2023 and the referral to the NMC on 13th September 2023.

22. The Claimant was then asked was she making any other claim of discrimination as it was not clear from her written application. She orally stated that had the number of shifts she was given reduced and then stopped. She advised that this was done due to her having a belief that it was her duty of care to look after patients. When asked if she was saying that these were acts of direct discrimination, with direct discrimination being explained, she confirmed that she was and that she was asking for the following allegations to be added as claims of direct discrimination:

a) That she was sent to work on pediatrics on 20/02/2023;
b) That she was told to go and see Deborah McLean and look and behaviors and frameworks on 21/03/2023;
c) The act of suspension and having her shifts removed on 18/05/2023.

23. When the Claimant was asked what her victimisation claim was, she advised that actually she was making the same allegations as under direct discrimination and harassment and that she was using the same factual matrix to support all 3 heads of claim.

24. When asked to address me on why these amendments should be allowed, if she considered them amendments and why they could not have been brought within the initial ET1, the Claimant submitted that she considered that all facts were pleaded in her ET1 and that this was just a relabeling exercise. The Respondent's position that these were entirely new claims that are no where in the original ET1. I agree with the Respondent. These claims are not anywhere in the original ET1. They are entirely new matters.

25. I asked the parties to address me on hardship and time limits, including, if it was accepted that these claims were late, why they could not have been brought in time. The Claimant claimed that she thought she had brought discrimination claims in the first ET1. She claimed that she did not try to make amendments sooner as she did not know that she could make amendments and add the claim and that she lacked knowledge of the system.

26. The Claimant claimed that she did not know what the first ET1 had said as she did not draft it. She claimed that the ACAS conciliator drafted it for her and submitted it for her. She claims that she only, many months after it being first submitted, saw a copy of the ET1. She then advised that the reason she submitted a new ET1 with the amended claims included was because she had spoken to the Cardiff Employment Tribunal who advised her to put in a fresh ET1 and that they issued the new ACAS certificates in February 2024, for Just Nurses Limited and The Placement Group. I wanted to be clear that I had understood the Claimant's claims in this regard so re-asked her, advising her that ACAS certificates are normally given by ACAS. She said that she definitely spoke to the Cardiff Employment Tribunal who issued the 2 ACAS consultation forms. The Claimant said that it would be unfair if she could not bring her claims as they were in the public interest.

27. The Respondent's points on prejudice were that the amendments, as plead, were unclear and that they were far out of time and that memories do fade and they would be prejudiced in defending the claim, notwithstanding any applications they may make for preliminary hearings if the amendments were allowed.

28. I find firstly, that the amendment application does not make clear what was being alleged and when. Whilst some clarity was gained over some hours in the preliminary hearing, there was not sufficient clarity certainly in the application. The EAT have made it clear that it is fundamental to any application to amendment that it must be considered in light of the actual proposed amendment (**Chief Constable of Essex Police v Kovacevic EAT 0126/13**). The Claimant's written application is simply unclear. Her oral explanations were also similarly unclear and she wanted her reflections document to be referred to and cross referenced. With respect, a Respondent is not expected to do that. They are to be provided with a clear list of allegations against them so as to allow them to prepare a defence to the same.

29. The Claimant's claim is not clear on who she claims that she has been treated worse than due to her protected characteristic, one would suppose she is saying that someone who does not believe in the Hippocratic oath, duty of candor and duty of care, but it is not clear.

30. As I find that what is requested as amendments is unclear, it follows that I must find that the application to amend is not allowed. However, if I am wrong in that finding, I go on to consider whether the application to amend should be allowed, if the nature of it is properly known.

31. I find that the Claimant is referring to incidents, the last being 13/09/2024. It is not suggested that she did not know about these incidents, including her date of dismissal, at the date her ET1 was submitted in October of 2023. I find that the Claimant's assertion that ACAS submitted her ET1 and thus she did not know what it contained to be factually incorrect. I find that she has misremembered facts as ACAS, as a conciliation service, do not draft ET1s and do not serve them. They are impartial in that they do not act for either side. The Claimant must then have seen her ET1. If the Claimant thought that she was being discriminated against since September 2022 and wanted to bring a claim about these things, they should have been included in her initial ET1. I find that it was entirely possible for her to have included these claims on her ET1, if she had wanted to bring them.

32. The ET1 was accepted from the date the address error was rectified so 27/02/2024. The last plead allegation is 13/09/2024. For the purposes of this exercise, I will assume that the allegations would be accepted to be a course of conduct and thus start time from the last act. Of course, this may not be the finding a Tribunal would make after hearing evidence. ACAS regarding the first allegation, in the first instance, started on 14/09/2023 and ended 26/10/2023. Thus a month and 12 days is added to the limitation period so the claims would have been at least a month out of time, if they had been included in the first ET1. However, they were not officially made until the application on 17/07/2024, which I accept was the application date. The Claimant first indicated her intention to add claims with her second ET1 that was submitted by email, direct to the Wales Employment Tribunal on 20/03/2024. The claims therefore are made many months out of time. Whilst being out of time does not of itself mean that an application should be refused, it is a discretionary factor. I find that the Claimant could and should have made these claims earlier. Whilst she has claimed that she has a lack of knowledge and appears to suggest she was wrongly advised by ACAS and the Wales Employment Tribunal, I find that the Claimant was able to bring an appeal to the Employment Appeals Tribunal and lodge an ET1 claim, albeit with an incorrect personal address. Further, I find that there is no source of legal advice at the Wales Employment Tribunal, or indeed any Employment Tribunal in England and Wales. I consider that the Claimant again appears to have misremembered matters.

33. Should the amendments be refused, the Claimant will be stopped from bringing any claim against the First Respondent. For the First Respondent, the First Respondent will firstly have to draft a new grounds of resistance, itself not a substantial issue noting the size and resources of the First Respondent. It will also have to continue to defend (if of course it chooses to defend) a case that will, by the very nature of the allegations, be multi day. However, most detrimental and convincing of the arguments heard by the First Respondent, is that these claims are so out of date that the memories of the witnesses that they will need to take evidence from will have faded and that this will be detrimental to their ability to defend the claim. I find that the prejudice in this case to the Respondent is such that it would be unjust to allow the amendments, taking into account the fact that

the Claimant could and should have brought these claims in time or indeed, far earlier. It was within her gift to fill in the ET1 correctly, further, to include all claims. The question as to her address is a straightforward question that should not have caused her an issue.

34. I next consider the "whistleblowing" amendment claim. Again, I have gone back to the ET1 to see what was stated and whether this could be branded a relabeling exercise, which is the Claimant's position. I find that the Claimant has been clear that she was bringing a claim of unfair dismissal. I find that there are no facts plead which suggest that the Claimant had made protected disclosures during her time working for the First Respondent or indeed the Second Respondent and that her treatment was for having done so. I find that the Claimant is seeking to bring new claims.

35. Again, I first sought to ascertain what I was being asked to add as a claim. This, I find, is not clear from the document submitted by the Claimant. I first asked for clarity on what protected disclosures she was claiming she had made and to whom. She advised that she made many incidents of wrongdoing to "Polly" from September 2022. It appears that "Polly" was from Just Nurses. Just Nurses, it is thought, after seeking clarity at the Preliminary Hearing, were not the Claimant's Employer, nor were they the "end user" but they were a company who appeared to source nurses from agencies for the First Respondent. When asked for dates and times, she advised that on 21/03/2023, when a complaint in work had been brought up again, she had mentioned bulling in the workplace. When asked for what other protected disclosures the Claimant was relying on, she advised that after she was suspended, she wrote a letter to Deborah McLean and Polly about what was doing on and did state that on all handovers, they could not datix. The Claimant claims that she was relying on these showing a health and safety reason, that being the health and safety of patients were being compromised. The Claimant said that she also had a video call on 01/06/2023 where she told Polly more concerns which she claims were about end of life care and that they were qualifying disclosures.

36. I note that the written application appears to suggest that other disclosures were made post referral to the NMC to various organisations and individuals, but these were not raised orally by the Claimant when asked to state all of the protected disclosures she was relying on.

37. I find that it was not clear, what, if any detriments were being relied on by the Claimant in her written application. Orally, after explaining "detriment" to the Claimant, she advised that she was relying upon being attempted to be forced to do a drug and communication course by the First Respondent, not being offered work and referring her to the NMC.

38. As with discrimination, I find that the amendments requested should be clearly set out. It is not for a Respondent to have to read through all the Claimant's papers and assume what she is claiming. The Claimant did not properly set out her claim. Even with significant time being given to attempt to understand her claim in the preliminary hearing, it was not very clear. The Claimant cannot remember all the times she spoke to people and cannot say if Polly told the First Respondent or indeed, the Second Respondent, she advised she assumes so.

39. I find that all of these alleged detriments occurred before the date the Claimant submitted the first claim. These should and have been included in that claim. I bring forward all of my findings in relation to the discrimination claims as they apply equally to the detriment claims.

40. I find that both the discrimination and whistleblowing claims should not be allowed to be added as amendments.

41. Moving now to "other payments", after a discussion about these at the hearing, it was agreed that the Claimant was not seeking to amend her claim to add any other claims in this regard.

Findings on time limits regarding unfair dismissal

42. Moving now to consider the point regarding time limits for the unfair dismissal claim. The Claimant advised that she believed that she received her P45 on 5/08/2023. The letter attaching it was dated 01/08/2023. The P45 was dated 18/05/2024. I find that the Claimant cannot be expected of course to bring a claim within 3 months of 18/05/2024, she simply did not know about the issue until almost that end of that period, being 05/08/2023. The Claimant was on notice that she had been dismissed only from 05/08/2023. I note that the Claimant started pre-claim conciliation against the Second Respondent on 14/09/2023 and that finished on 26/10/2023. That is a total of 1 month and 12 days. Even allowing for the extension of time proving by ACAS conciliation, the claim is some 2 months out of time. I must consider whether it was not reasonably practicable to present the claim in time. To this end, I note that the Claimant in fact did draft a claim for unfair dismissal and did lodge it with the Tribunal within time. Whilst I am aware that I must give a liberal construction to the extension reason to a Claimant, the question of what is reasonably practicable is one of fact. I find that it was reasonable that the Claimant put her correct address on the ET1. As stated above, I do not accept that ACAS drafted and submitted the ET1 for the Claimant. They are a conciliation service. They do not act for parties as representative. The Claimant, by the many documents that she has produced and the speed at which she replied to the Tribunal, when asked to provide her address, has demonstrated that she could understand that written instruction. As I find that it was reasonably practicable for the Claimant to have presented her claim in time, it means that no grounds for extending time exist and therefore the claim must be struck out as the Tribunal does not have jurisdiction to hear it.

A. . Lloyd-Lawrie
Employment Judge

Date 23 September 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 24 September 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche

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