EMPLOYMENT TRIBUNALS

Claimant: Mrs Cynthia Arthur

Respondent: Hertfordshire Partnership University NHS Foundation Trust

PRELIMINARY HEARING

Heard at: Watford Employment Tribunal **On:** 7 November 2019

Before: Employment Judge Tuck

Appearances
For the claimant: Mr Bidnell-Edwards, counsel.
For the respondent: Ms Omambala, counsel.

JUDGMENT

The Claimant's application to amend her claim for reasonable adjustments is granted.

REASONS.

(1) The procedural history of this matter is now a protracted one:

(i) An ET1 was presented on 5 November 2017 complaining of detriments and dismissal for making protected disclosures, unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments.
(ii) The ET3 was presented on 3 January 2018, and further particulars were sought.
(iii) On 9 April 2018 the Claimant in response to an order provided the Further and Better Particulars sought.
(iv) A case management hearing took place before EJ Palmer on 16 April 2018 (incorrectly dated 2017). The issues were defined and the matter listed to be heard over 15 days in March 2019.
(v) On 27 September 2018 the Claimants claim of unfair dismissal was dismissed on withdrawal.

(vi) On 29 October 2018 EJ Manley conducted a telephone PH took place (as the Claimant was unable to attend), and a number of applications, including for strike out or deposit orders, were listed to be heard on 7 December 2018. At that hearing, EJ Manley struck out the whistleblowing complaints, or alternatively said she would have ordered deposits.

(vii) On 13 March 2019 a further preliminary hearing took place before EJ McNeill QC to determine whether the claimant was disabled at material times. She concluded that she was.

(viii) On 13 August 2019 the EAT (HHJ Eady QC as she then was) overturned the decision to strike out the whistleblowing claims, but upheld the deposit orders.

(ix) On1 October 2019 an order from EJ Manley was sent to the parties, ordering two deposit be paid, one for the "detriments" claims and dismissal claim. (In relation to the deposit order for the detriments claims, Respondent today noted that the Claimant alleges around 39 detriments and asked - if she succeeds on some but not all, what will be the position as to costs / the deposit? This must be a matter for the ET which hears the substantive liability matter.)

(2) Against this background the case came before me today, to consider in the first place an application by the claimant to amend her ET1, and to give case management orders.

Application.

(3) On 17 May 2019 on behalf of the claimant an "Amended Statement of case for the Claimant's disability Claims" was drafted and sent to the Respondent. That is a nine page document, and in relation to cause of action of failure to make a reasonable adjustment, it identifies two "PCPs". The first PCP is said to be;

> "the Respondent's policy of proceeding with a disciplinary hearing when the claimant cannot attend or submit written submissions".

This is said to place disabled employees at a disadvantage as they are more likely to be unable to attend disciplinary hearings or submit written representations, and the adjustment sought is to have postponed the hearing until after 14 July 2017. This is a matter which is clearly within the ET1 (at paragraph (aa)), and the issues were identified before EJ Palmer on 16 April 2018.

(4) The second PCP is said to be;

> "The Respondent's policy of refusing to consider an appeal against dismissal where it has not been submitted within 10 days from the date of the letter which communicates the dismissal to the employee".

It is said to place disabled employees at a substantial disadvantage as they are less likely to be able to comply with the 10 day time limit, and it is clear to infer that the adjustment sought is to extend the time within which an appeal could be submitted to 25 July when she in fact sent the appeal letter. As EJ McNeill stated in her judgment determining the preliminary issue of whether the claimant was a disabled person at the material time (heard on 13 March 2019) "this was not part of the Claimant's pleaded claim and was

not referred to in the list of issues" (i.e. the issues identified before EJ Palmer).

(5) I pause here and note that in considering the detriment to disabled staff arising from both PCPs, there is in the application to amend a "comment" that this would result in dismissal / mean the dismissal remained. As I put to Mr Bidnell –Edwards in this hearing, it was not however alleged that not dismissing the claimant or reinstating her would have been reasonable adjustments. Nor is the "DAFD" claim expressed (in the ET1 / list of issues prepared by EJ Palmer or expressly in the "amended disability claim) to complain of dismissal being the unfavourable treatment; rather it is the disciplinary hearing proceeding in the absence of the claimant.

(6) It is (only) in relation to this second reasonable adjustment claim that I am asked to determine an application to amend the ET1.

(7) Mr Bignell-Edwards submitted primarily that this amendment did not raise any new claim because the very concise ET1 complained about proceeding with the disciplinary process in the Claimant's absence. He characterised the amendment as being of a minor nature, simply drawing out matters within the ET1. In any event he places considerable weight on the Respondent's not objecting to the further and better particulars provided on behalf of the Claimant on 9 April 2018 and points out that the Respondent has been on notice of this complaint since that date. He contends that there is no material prejudice to the Respondent, and in answer to a question, told me that the letter stating that the Claimant's appeal was out of time had been written by Mr Loveman, the dismissing officer (previously a named respondent). He said the balance of prejudice was very much in the claimant's favour.

(8) Ms Omambala for the Respondent pointed out that this is clearly not within the ET1, and that it is not for a Respondent to discern additional complaints for a Claimant, particularly when they are represented by solicitors and counsel. The order that the Claimant answer the request for F&BPs did not give permission to expand the complaint. No explanation whatsoever has been given as to why, when these particulars were drafted on 9 April 2018, a week before the PH before EJ Palmer on 16 April 2018, the application to amend was not made on that occasion, some 18 months ago. There was also an application to amend the whistleblowing claim on 6 November 2018, and nor was that opportunity taken to make the application. It was only after the hearing in March 2019 before EJ McNeill, who stated (as set out above) that this complaint was not before the tribunal, that the application was made, and then there was a delay of some two months. As to prejudice she submitted that the Respondent would have to give additional disclosure and call more evidence, and that while she frankly accepted it would not add to the length of any future listing, it would open up new areas of evidence. Whilst she took issue with the adequacy of the pleaded amendment, she again frankly accepted that any defects were not such as to stop her from seeing how the claim was put. She submitted that it was not proportionate to

permit this very late application, particularly as the facts were all known to the claimant before her counsel drafted the ET1.

Law.

(9) Presidential guidance on the amendment of claim forms essentially sets out the principles to be drawn from the two seminal cases of ***Cocking v Sandhurst (Stationers) Ltd [1974***] ICR 650, and ***Selkent Bus Co Ltd v Moore*** [1996] ICR 386. The guidance includes the following:

a. Para 5.1 – applications vary from the correction of clerical and typing errors to the addition of facts, the addition or substitution of labels for facts already described, and the making of entirely new factual allegations which change the basis of the existing claim. The tribunal must decide whether the amendment applied for is minor or a substantial alteration describing a new complaint.
b. Para 6.1 – the tribunal draws a distinction between amendments as follows:
    i. Those that seek to add or substitute a new claim arising out of the same facts as the original claim; and
    ii. Those that add a new claim entirely unconnected with the original claim.
c. Para 12 – where a party seeks to add a new ground of complaint, the ET must look for a link between the facts described in the claim form and the proposed amendment. If there is no such link the claimant will be bringing an entirely new cause of action. In this case, the Tribunal must consider whether the new claim is in time.

(10) Mummery J in **Selkent** provided non-exhaustive guidance beyond considering the nature of the amendment, namely he said that it is important to consider the applicability of time limits (ff 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), and the timing and manner of the application. He said “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.”

(11) Mr Bidnell-Edwards provided a skeleton argument, and submitted that time limits are “of little weight where there is an existing in time claim containing similar facts” – relying on **Jesuthasan v Hammersmith and Fulham**

Borough Council [1998] IRLR 372, and **R v Secretary of State for Employment ex p EOC** [1994] IRLR 176, He quoted from the latter, but that was a case where a different legal label was put onto facts already pleaded.

(12) I drew the attention of the parties to the case of ***Galilee v Commissioners of Police of the Metropolis*** [2018] ICR 634, EAT in which HHJ Hand QC held (at para 109(a)) that "amendments to pleadings in the ET which introduce new claims or causes of action take effect for the purposes of limitation at the time permission is given to amend".

Conclusions on amendment application.

(13) The second reasonable adjustments claim is not within the ET1. That document is set out chronologically and the paragraphs which follow (aa) make it clear that the story stops at the date of dismissal. I do not accept that it broadly complains about the entire disciplinary process, and indeed it is apparent that neither EJ Palmer nor EJ McNeill QC discerned any such complaint in the ET1.

Nature of Amendment.

(14) This is not an instance of a new label being placed onto already pleaded facts, I am satisfied that it is the addition of a new claim. To understand it requires additional factual matters to be set out, namely the time limit within which appeals were said to be permitted, the date on which the claimant submitted her appeal and the determination by the Respondent that it was out of time and would not be considered.

Applicability of Time Limits

(15) I do, in my judgment have to consider time limits in these circumstances, and **Galilee** makes it clear that it is today, 7/11/19, when this issue falls to be considered. This complaint is about matters 28 months ago, and on any analysis is not only significantly out of time today, but would have been out of time had the application to amend been made on 16 April 2018 when it could (and should) have been made.

(16) The time limits however in claims of discrimination may be extended if it is "just and equitable" to do so (s 123 EqA 2010), and I consider the relative hardship to the parties (set out below) to be of significance in considering the exercise of this discretion.

Timing and manner of application

(17) This application was not made until May 2019; the claim should have been in the ET1, all the facts being known to the claimant; there should have been an application to amend on 16 April 2018, some 7 days after the claim had been expressed in the F&BPs; it could have been made in November 2018 when there was an application to amend the whistleblowing claim, and it is apparent that it was discussed in March 2019 before EJ McNeill QC. There was a delay of two months even after she had said that an amendment would be needed if the matter was to be pursued. I have received no explanation for these delays, and any suggestion that it was for the

Respondent to object to an application – which was not in fact made – at some point after 9 April 2018, I expressly reject.

(18) However, the most compelling matter in my judgment, is what the relative hardship is to each party.

(i) I do not consider the hardship to the claimant to be very great if the application is dismissed because her main complaint is of the disciplinary hearing going ahead in her absence, and this is clearly before the tribunal. However, the lack of an opportunity to have an appeal determined is a separate complaint, and as Ms Omambala accepted, there is always some prejudice if an application is refused.

(ii) As to the hardship to the respondent, I accept that further factual matters will have to be explored, and additional documents disclosed and witness evidence given. However, Mr Bidnell-Edwards told me that the letter stating that the appeal would not be considered because it was out of time, was sent by Mr Loveman, the dismissing officer. Allowing the amendment would not therefore lead to any further witnesses being called. I also accept the submission of Mr Bidnell-Edwards, that the Respondent having made a decision not to postpone the disciplinary process for the 6 weeks identified in the OH report, seems to have given rise to both the decisions to proceed with the disciplinary hearing in the absence of the claimant, and as a further consequence of that same decision, not to hear a 'late' appeal.

(19) Whilst this decision is finely balanced, I consider that it would be unsatisfactory for the tribunal hearing this matter to hear the entire story up to dismissal, then not to have the final instalment which can be put in very short order, dealing with the lack of an appeal. I do consider that the hardship to the claimant would be greater than that to the respondent, and despite it being significantly out of time and there being no good explanation for the delay, I will permit the amendment.

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Employment Judge TUCK

7 November 2019.

Sent to the parties on:

22 November 2019

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For the Tribunal:

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