



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE H WILLIAMS QC

BETWEEN:

Miss P Bertram

Claimant

AND

Bermondsey Community Nursery

Respondent

ON: 3 July 2018

APPEARANCES:

For the Claimant: In person
For the Respondent: Mr D Smith, Counsel

PRELIMINARY HEARING: JUDGMENT

1. The Claimant is refused permission to amend her claim to include:
 - (a) The allegations of race discrimination set out in her application to amend made on 20 February 2018;
 - (b) The allegations of sex discrimination set out in her application to amend made on 20 February 2018; and
 - (c) Allegations that she was discriminated against as a part-time worker in that consideration of her application for part-time working was delayed and then only reluctantly approved; and that she was treated less favourably when applying for annual and compassionate leave.

REASONS

Written reasons are provided at the request of the Respondent, oral reasons having been given at the hearing on 3 July 2018

Background

1. The Claimant was employed by the Respondent as a Nursery Manager from 5 July 1993 to 19 June 2018, when she was dismissed by the Respondent without notice.
2. The Early Conciliation period ran from 26 July to 25 August 2017 and the Claim Form was presented to the Tribunal on 24 September 2017. The Claim Form advanced a claim for unfair dismissal in which the Claimant challenged the reason for her dismissal, the fairness of the process and the fairness of the decision to dismiss her. In the details attached with the Claim Form, the Claimant said that the Chair of the Management Committee, Ms J Seymour had said that *“the nursery needed a manager to make it sustainable that can be trusted and that can work full-time”*.
3. The Respondent’s Grounds of Resistance contended that the Claimant was fairly dismissed for a conduct issue amounting to gross misconduct and sought clarification of the apparent allegation of discrimination on the basis that the Claimant worked part-time.
4. At a Preliminary Hearing held on 24 January 2018 the Claimant also raised the possibility of race and sex discrimination claims. The boxes denoting claims of that nature had not been ticked in Section 8 of the Claim Form and the details provided in support of the claim did not refer to such complaints. EJ Andrews ordered that if the Claimant wished to pursue those matters she was to make a written application to amend her claim by 21 February 2018. The order specified that the application *“will set out in detail what those claims are and why she did not include them in her claim form”*. The Respondent was directed to reply to the application, indicating if it was agreed or opposed, by 14 March 2018.
5. As regards the part-time worker discrimination claim, EJ Andrews ordered that by 21 February 2018 *“the Claimant shall send in writing to the Tribunal and to the Respondent further particulars of her claim of part-time worker discrimination. She shall set out in detail the detrimental treatment (including her dismissal) that she says she received because of her part-time status, when that treatment occurred, who was responsible for it and if there were any witnesses”*.

The application to amend the claim

6. By an email sent to the Tribunal on 20 February 2018, the Claimant applied to amend her claim. In relation to sex and race discrimination allegations, she said the following:

“Sex discrimination

I was treated less favourably and discriminated against on the grounds that as a part-time worker, which are more commonly women with responsibilities caring for two young children and a sick partner, the Management Committee were reluctant to accept my flexible working request. I was looked on less favourably as a sole parent and carer of young children by the Management Committee. The new Chair of the Management Committee was brought in with a specific objective to replace me with a full-time manager.

“Race discrimination

I was treated less favourably and discriminated against on the grounds of my race due to the refusal by the management committee to pay me a bonus that was previously agreed, whereas two Caucasian staff were offered and received bonuses without the requirement of additional work above and beyond their normal daily tasks. I have still not received the bonus promised to date despite numerous requests and my requests being ignored. The management committee questioned my qualifications and the qualifications of other black employees, which resulted in me re-submitting my certificates whilst their Caucasian colleagues have never been asked to present their qualifications, despite this being brought to management’s attention. I was treated less favourably on contractual terms and conditions in relation to deductions and withholding of from salary as compared to a Caucasian colleague...I had been employed by the company for over 24 years with an unblemished record, unfairly dismissed and replaced not by an experienced black manager who was employed as an assistant manager for over 30 years, but instead replaced by a full-time Caucasian manager with no experience in the company.”

7. In the same email, the Claimant also purported to provide the particularisation of her part-time working discrimination claim. As I have recorded in the Case Management Order made in relation to the hearing, the Respondent accepted that a number of these matters fell within this category. However, objection was raised to two of the allegations that were included, on the basis that they went considerably further than particularisation of an existing claim. These allegations were that:
- (a) Consideration of the Claimant’s request to work part-time was unacceptably delayed outside of the statutory response timeline and reluctantly approved; and
 - (b) The Claimant was treated less favourably than a full-time employee when applying for annual and compassionate leave.

As these matters plainly went beyond the limited references in the Claim Form to her treatment as a part-time worker in relation to the dismissal, I indicated that these allegations would also need to be the subject of a successful application to amend for them to be included within the claim. The Claimant indicated that she wished to pursue this application.

8. The Respondent opposed the applications to amend. The reasons for objection were set out in an email sent to the Tribunal on 14 March 2018 and in the Skeleton Argument that Mr Smith prepared for the hearing on behalf of the Respondent. Both parties developed their respective submissions orally.

Relevant law

9. The application to amend falls to be considered by reference to the principles identified in the well-known *Selkent Bus Co v Moore* [1996] IRLR 661 line of authorities. The applicable principles are also summarised in the *Presidential Guidance Note 1: Amendment of the Claim and Response*.
10. It is incumbent on the Tribunal to carry out a careful balancing exercise of all relevant factors and to determine whether to grant or refuse the proposed amendment having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing it.
11. In turn, this involves a consideration of the scope of the amendment to be made, whether it involves new factual allegations and/or new causes of action. The Tribunal must assess whether the amendment sought involves minor matters or substantial alteration. Obviously, there is a continuum of possibilities.
12. If the proposed amendment involves a new complaint and/or new cause of action then the Tribunal must consider whether the complaint is out of time and, if so whether the time limit should be extended. In this instance, as allegations of discrimination are involved, this involves assessing whether it would be 'just and equitable' to extend time, in that eventuality.
13. The Tribunal must also consider the timing and manner of the application, including an explanation as to why the claim was not advanced earlier. Ultimately, it is a question of balancing relative injustice and hardship, as I have indicated.

The nature and scope of the proposed amendments

14. As regards part-time worker discrimination, the two allegations I have set out at paragraph 7 above, involve the introduction of claims based on new facts. The first allegation relates to matters back in 2009 when the Claimant first requested and subsequently began to work part-time, specifically the way that request was handled. The matters raised in the Claim Form were focused upon her dismissal in 2017. The second allegation, relates to the way that the Respondent handled her requests for annual and compassionate leave and seeks to introduce entirely new topics to the claim. In so far as Ms Bertram suggested to me that the terms of the earlier Order indicated that EJ Andrews was approving or even encouraging her to expand her part-time worker discrimination claim, I consider that is a mis-reading of the Order. It is apparent that EJ Andrews was simply trying to obtain clarification of the existing claim and the relevant details relied upon.

15. As regards the sex discrimination claim, the first matter raised is, in effect a repetition of the first additional allegation I have considered in relation to part-time worker discrimination. For the same reasons it relies on the introduction of new facts. Further, sex discrimination is a new cause of action. The last sentence of the paragraph concerning sex discrimination in the application to amend, alleges the Respondent dismissed her to replace her with a full-time employee. As such, it simply repeats an allegation of part-time worker discrimination that has already been made in the Claim Form (see paragraph 2 above) and no question of amendment in fact arises.
16. The middle sentence of the sex discrimination paragraph alleges that the Claimant was looked on less favourably because she was a sole parent and carer of children. This is a new allegation, both in terms of seeking to introduce further facts and an additional cause of action.
17. There are, broadly, four allegations made in relation to race discrimination, namely, that: (i) a bonus was not paid to the Claimant that had been previously agreed; (ii) she was required to re-submit her certificates following unwarranted questioning of her qualifications; (iii) she was treated less favourably in relation to deductions and withholding from salary; and (iv) her race played a part in the decision to dismiss her.
18. Allegations (i) – (iii) involve entirely new factual matters and new causes of action. Allegation (iv) concerns the dismissal, which is already the central focus of the claim, but introduces a new claim of race discrimination and new factual material in relation to comparators.

The limitation position

19. Allegations relating to the dismissal would be presented in time if brought by 30 October 2017 (the three-month time period as extended by the early conciliation provisions contained in section 207B, Employment Rights Act 1996). As has already been noted, they were in fact raised on 20 February, more than three months later.
20. Moreover, most of the proposed amendments contain allegations that date much further back than the Claimant's dismissal. Specifically, as clarified with Ms Bertram during the hearing:
 - The handling of her request to work-part time occurred in 2009;
 - A relevant request for compassionate leave was made in 2010 when the Claimant's father died. She told me that there were also later requests in relation to other family members, but she was not able to provide any indication of the dates or time periods involved;
 - The complaint about the handling of the annual leave requests was said to arise each year, going back to 2009;
 - The Claimant said that a number of remarks had been made about her status as a single parent. She gave as an example, an instance in December 2016;

- The bonus that she had raised in relation to the race complaint had become due to her in 2013 or 2014;
 - Her qualifications had been questioned at a Management Committee meeting in 2016 and during a further conversation in March 2017;
 - The complaint about deductions and withholding of salary occurred at least in part during the dismissal process.
21. Accordingly, the primary time limit for these claims had expired years, rather than months ago, in most instances. Further, from the information provided, the matters relied upon did not appear to be acts extending over a period. Although the Claimant suggested that this was the case where payment to her was still outstanding, it is in fact well established that regarding a failure to make a payment, such as a bonus, that falls due at a particular point, time runs from that failure; the sheer fact that payment remains outstanding does not mean that it is an act extending over a period.
22. Accordingly, it is necessary to consider whether it is just and equitable to extend time. The first question is whether that can be fairly assessed at this stage, before evidence is heard in relation to the claims. I am satisfied in this instance that it can be.
23. In this instance the length of the delay is very substantial in most instances. Despite EJ Andrews' Order, the Claimant did not provide any explanation in her application to amend as to why these allegations were not included in her Claim Form. She told me that it was because she did not realise that it was possible to tick more than one box in Section 8 of the Claim Form, to denote that she was bringing more than one claim. I do not consider this to be a satisfactory explanation. There is nothing in the wording on the Claim Form to suggest that this is the case, indeed the form refers to ticking "one or more" of the boxes and it would make no sense, for example, for a Claimant to have to choose between claiming unfair dismissal or seeking their notice monies. Furthermore, as Mr Smith observed, this would not preclude the Claimant from referring to these matters when she set out her narrative of the relevant events. In addition, there was no explanation advanced as to why allegations dating back to 2009 were not advanced earlier (beyond the general inference that whilst the Claimant remained in employment with the Respondent she would have been reluctant to embark on litigation).
24. Given the extent of the delay I am satisfied that the cogency of the evidence is likely to be affected in circumstances where the proposed amendments involving, amongst other things, disputed allegations as to what was / was not said to the Claimant on various occasions.
25. I also note that at this stage, many of the allegations are relatively vague in terms of dates and details, even following a discussion with the Claimant about these matters at the hearing.

26. A further consideration is that the case is currently due to be heard over four days commencing on 25 September 2018. The listing was made at the January 2018 Preliminary Hearing. However, if the amendments, or a significant part of them were to be permitted it is very unlikely that this hearing date could be maintained as there would need to be time allowed for amended pleadings from each party in sequence; then for additional disclosure; for preparation of a significantly expanded bundle of documents; and for identification of additional witnesses and obtaining their accounts. If the hearing is postponed, it is unlikely that it could be listed to be heard for at least the next 14 months, due to the current back-log of cases and limited judicial resources in the region. Accordingly, permitting the amendments would be likely to delay the hearing date by around a year at least, which is plainly undesirable, particularly in a case that involves much disputed evidence.
27. In weighing up the various factors, I of course bear in mind that the Claimant is a litigant in person and that she will be unable to advance her additional claims of discrimination if I do not permit the amendment.

Conclusion

28. However, weighing up all relevant matters, I am quite satisfied that it is not in the interests of justice to permit the proposed amendments and that to do so would entail significantly greater hardship to the parties, than refusing them.
29. As I have explained above, the proposed amendments would involve a very substantial expansion of the claim, both in terms of the facts relied upon and the causes of action involved. The majority of the allegations are raised well outside of the applicable time limits in circumstances where it would not be just and equitable to extend time for presenting these claims. Many of the allegations remain vague in terms of detail and permitting amendment would lead to the current hearing date being vacated and a delay of at least a further year in the hearing of a claim that involves significant disputes of fact.

Employment Judge H Williams QC
Date: 8 July 2018