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EMPLOYMENT TRIBUNALS

Claimant: Mrs L Sylvester
Respondent: Barnes & Partners Solicitors
On: 10 May 2019
Before: Employment Judge Jones

After consideration of written representations from both parties:

JUDGMENT

The Claimant's application to amend her claim is refused.

REASONS

1 The Claimant made a written application to amend her claim on 25 March. The Respondent received it just before the start of the preliminary hearing. It was sent to the Respondent and the Tribunal by email at 8.28am that morning. The Respondent asked for leave to consider its response. The Tribunal gave the Respondent until 1 April to do so.

2 The Respondent complied with that request and wrote to the Tribunal on 29 March to oppose the Claimant's application to amend her claim. The Respondent has cited time limits as one of the reasons why it opposed the application. It was also submitted that sections 57A and 99 of the Employment Rights Act 1996 did not apply as the Claimant had not asked for dependent leave on any of the three days during which she was employed and arrived late for work.

3 The Claimant wrote to the Tribunal on 8 April to add a complaint of breach of contract to her case. The Claimant did not explain why she was only now seeking to add a breach of contract claim or what the claim related to. It is likely that this is a reference to the fact that she did not receive notice pay but it is not clear from her application.

4 The Tribunal considered that the Claimant was dismissed on 17 October. The Respondent is a firm of solicitors. The Claimant went on to new employment with another firm of solicitors after her dismissal. The Claimant is not legally qualified and is a legal secretary.

5 The Claimant began the early conciliation process on 22 October 2018. Her ET1 issued on 10 December 2018 makes complaint of sex discrimination on the basis of being a mother of a dependent child and for injury to feelings as part of the remedy if she were successful.

6 The Claimant gave no reason at the hearing on 25 March, in her written application to amend of the same date or in her subsequent letter of 8 April seeking to add the breach of contract claim; why her application to amend was made 3 months after the claim was issued.

Law

7 The Tribunal considered the principles set out in the case of *Selkent Bus Co. v Moore* [1996] ICR 836 in which the EAT set out general practice and procedure governing the approach a tribunal should take when considering amendments to existing claims. Mummery J stated that the relevant circumstances to be taken into account by the tribunal in balancing the injustice and hardship of allowing the amendment as against refusing it includes; the nature of the amendment, the applicability of time limits whether there should be any extensions and the timing and manner of the application.

8 The “nature of the amendment” requires the tribunal to consider whether the Claimant seeks to add new facts to existing allegations or to put new labels on facts already pleaded i.e. whether it is simply a re-labelling exercise; or whether the Claimant is making entirely new factual allegations which change the nature of the existing claim. The Tribunal needs to consider whether the amendment sought is minor or represents a substantial alteration, pleading a new cause of action.

Decision

9 In this case the Claimant seeks to add 3 new causes of action. The indirect sex discrimination claim outlined in paragraph 3 of her 29 March application is not understood. How would the Respondent know that it was more likely that the Claimant would be late for her job on the third day? Why would the Respondent go through the expense and time commitment to train someone if they did not want to employ them? What is the provision, criterion or practice relied on and how does the Claimant say that it put her at a disadvantage because of her gender? These points were not explained in her application or in her further letter dated 8 April or at the hearing on 25 March 2019.

10 The Respondent disputes that the Claimant ever asked for time off as set out in section 57A of the Employment Rights Act 1996. Section 57A states that an employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee’s working hours to care for an ill dependent or other unexpected circumstance with that dependent. In her ET1 the Claimant did not state that she had

asked for leave and been refused. She simply stated that she was late on each occasion because of caring for her child who was unwell.

11 At the hearing she developed this further and suggested as part of her sex discrimination complaint that she had informed the Respondent - Mr Damania in particular - each morning when she telephoned to let them know that she was coming late; that she was caring for her sick daughter. She also stated that the Respondent ought to have known that it was likely that she would be late on the third day and that in requesting her to attend the induction at the Enfield office they deliberately set her up to fail. The Claimant is now seeking to change her claim to make a complaint under section 57A on the same alleged facts, which is a new claim and a new cause of action.

12 The Claimant also seeks to add a complaint of breach of contract. This is also a new cause of action. Breach of contract complaints in the Employment Tribunal must be submitted within 3 months of the effective date of termination. The Claimant was dismissed in October and therefore this complaint should have been submitted in January. It was not submitted until March. It was therefore submitted late and outside of the statutory time limit. Article 7 of the Employment Tribunals Extension of Jurisdiction Order 1994 states that where the Tribunal is satisfied that it was not reasonably practicable for the complaint to have been presented within the three-month period that it can extend time. The Tribunal has no information from the Claimant from which it can conclude that it was not reasonably practicable for her to have issued her complaint within the time limit.

13 In this Tribunal's judgment the application to amend contains 3 complaints that were within the Claimant's knowledge at the time she issued her ET1 and it is unclear why she only sought to add them to her claim in March. Also, the indirect sex discrimination complaint and breach of contract complaint are both unclear. Is it the Claimant's case that she is entitled to notice pay after being employed for 3 days?

14 It is this Tribunal's judgment that in making these amendments the Claimant is seeking to substantially alter her claim and to raise new factual allegations. In relation to the indirect sex discrimination complaint and the section 57A Employment Rights Act complaint she is seeking to add new causes of action.

15 It is also clear that all the new allegations she seeks to add relate to her induction in October 2018. The application to amend was made in March which means that those complaints are all out of time. The Tribunal had no information in the application that would enable it to consider whether it could be just and equitable to extend the time limit to allow the Tribunal to consider the allegation of indirect discrimination. The complaint of automatic unfair dismissal under section 57A and 99 of the Employment Rights Act are subject to the stricter time consideration of whether it was reasonably practicable for the Claimant to have issued within the three-month time limit set out in section 111 of the same Act. The Tribunal has no information that could lead it to conclude that it was not reasonably practicable for the Claimant to have issued these complaints at the same time she issued her ET1 form.

16 The Tribunal was not given any reasons why these complaints were not added to the ET1 or why they were not presented to the Tribunal before 25 March. It is this Tribunal's judgment that it was reasonably practicable for these complaints to be brought in time. It is unlikely to be just and equitable to extend time to allow the indirect sex discrimination complaint to proceed especially when the complaint is not clearly spelt out in the application and not understood. The Claimant has had ample opportunity in her ET1, in the application, at the preliminary hearing on 25 March and in her subsequent letters to the Tribunal on 8 April to explain her claims and she has failed to do so.

17 After due consideration, it is this Tribunal's judgment that the Claimant's application for leave to amend her claim to add complaints of indirect sex discrimination, automatic unfair dismissal contrary to section 57A and 99 of the Employment Rights Act 1996 and breach of contract is refused.

18 The existing complaint of direct sex discrimination is as set out in the minutes from the preliminary hearing on 25 March and sent to the parties on 18 April.

19 The liability and remedy hearing on the complaint of sex discrimination will take place on 10 – 11 October 2019 at East London Hearing Centre, 2nd Floor, Import Building, 2 Clove Crescent, London E14 2BE.

20 Following receipt of correspondence from the parties, the Tribunal Orders that were made on 26 March are amended so that the date for disclosure of documents is changed to **13 May 2019** and the bundle of documents is to be served on the Claimant in hard copy file by **29 July 2019**. The parties are to comply with all the other Orders made on 26 March to ensure that the case is ready for hearing.

Employment Judge Jones

18 May 2019