EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104612/2020 (V)

Preliminary Hearing Held remotely on 26 February 2021

Employment Judge A Kemp

Miss S Craig	**Claimant** **In person**
Symbiosis Pharmaceutical Services Limited	**Respondent** **Represented by:** **Ms M Davidson,** **HR Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant's provision of further particulars of her claim by her email dated 24 November 2020 is, so far as an application to amend her Claim, granted in respect of the claim under section 101A of the Employment Rights Act 1996, but refused in respect of the claims under section 104 of that Act and section 27 of the Equality Act 2010.

2. The claimant's claims under section 94 of the Employment Rights Act 1996, and for breach of contract, are struck out under Rule 37.

REASONS

Introduction

1. This Preliminary Hearing was arranged to consider an application for amendment by the claimant made by email on 24 November 2020. It was opposed by the respondent. The hearing was held remotely and although there were connection issues I was satisfied that it had been conducted adequately.

Context

2. The application to amend is to be considered in the context of the existing pleadings, and although no facts were established it is understood that the essential details are not disputed.

3. The claimant was employed by the respondent until 3 July 2020 (having been paid in lieu of notice it is not clear if that was the date of termination, or if it was when dismissal was intimated on 26 June 2020 which is the date the claimant suggested, but the later date is what the respondent alleges). She had commenced employment with them on 30 September 2019. In her Claim Form, presented on 27 August 2020 after early conciliation in July, she had referred to claims of discrimination, breach of contract and automatic unfair dismissal. In that last regard she had referred to her position under the Working Time Regulations 1998, in what was clearly a reference to the right to weekly rest under Regulation 11.

4. The further particulars gave details of claims for:

   (i) Breach of section 101A of the Employment Rights Act 1996

   (ii) Breach of section 104 of the Employment Rights Act 1996

   (iii) Breach of section 27 of the Equality Act 2010.

Claimant's submission

5. The following is a basic summary of the submission made. The claimant was acting for herself and not sure of the precise provisions that the events fell in to. She had been dismissed for what were performance issues which

she disputed were correct, and the principal reason for dismissal. She had been told to work on a Sunday, having worked the previous six days, and when she did not agree to do so was dismissed on the following Friday. She had referred to that in the Claim Form. The first claim in paragraph 4 above had been made. The second flowed from that, although she was not able to articulate when and how she intimated to the respondent that there had been an alleged infringement of the right. The third she felt was a mixture between victimisation on grounds of her sex, and other events involving the dismissal of another employee. She was not able to set out the protected act on which she relied.

Respondent's submission

6. The following is a basic summary of the submission made by Ms Davidson. The claims had not been in in the Claim Form, apart from the one relating to working time, and were not being pursued late. The arguments made by the claimant were not relevant. The facts did not support her assertions. There had been no requirement to work on a Sunday. She had not asserted any statutory right. There was nothing in the Claim Form as to victimisation, and what had been said about it was not relevant to that claim. She accepted that she could not argue any hardship if the amendment was to be allowed.

The law

7. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to address that, save in respect of additional respondents in Rule 34, set out below. It falls within the Tribunal's general power to make case management orders set out in Rule 29 which commences as follows:

> "**29 Case management orders**
> The Tribunal may at any stage of the proceedings, on its own initiative or on application to make a case management order."

8. Rule 29 requires to be exercised having regard to the overriding objective in Rule 2. It states as follows:

> "**2 Overriding objective**
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

9. Earlier iterations of the Tribunal Rules of Procedure did contain a specific rule on amendment, and the changes brought into effect by the current Rules, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, require consideration when addressing earlier case law.

10. The nature of the exercise of discretion in amendment applications was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. The EAT stated the following:

> "Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
>
> What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant;

"(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If 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, eg, in the case of unfair dismissal, s.67 of the 1978 Act.

(c) The timing and manner of the application

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. In a number of cases distinctions are drawn between firstly cases in which the amendment application provides further detail of fact in respect of a case already pleaded, secondly those cases where the facts essentially remain as pleaded but the remedy or legal provision relied upon is sought

to be changed, often called a change of label, and thirdly those cases where there are both new issues of fact and of legal provision on which the remedy is sought. The first two categories are those where amendment may more readily be allowed. The third category is more difficult for the applicant to succeed with, as the amendment introduces a new claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time. It is this third category of case that the present application falls into.

12. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said this in relation to an amendment which arguably raises a new cause of action, suggesting that the Tribunal should

> " … focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry 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."

13. In order to determine whether the amendment amounts to a wholly new claim, the third of the categories set out above, it is necessary to examine the case as set out in the original Claim to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v Bryant [1999] ICR 123***). In that case the claimant made no reference in her original unfair dismissal claim to alleged victimisation, which was a claim she subsequently sought to make by way of amendment. The Court of Appeal rejected the amendment on the basis that the case as pleaded revealed no grounds for a claim of victimisation and it was not just and equitable to extend the time limit. It said that the proposed amendment 'was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time'.

14. Section 123 of the 2010 Act provides as follows

> "**123 Time limits**

> (1) [Subject to [sections 140A and [section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

15. This therefore provides that the Tribunal has jurisdiction under the 2010 Act if a claim is commenced within three months of the act complained of, but there are two qualifications to that, firstly where there are acts extending over a period when the time limit is calculated from the end of that period, and secondly where it is just and equitable to allow the claim to proceed.

16. The assessment of what is just and equitable involves a broad enquiry with particular emphasis on the relative hardships that would be suffered by the parties according to whether the amendment is allowed or refused.

17. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time, and the exercise of discretion is the exception rather than the rule (***Robertson v Bexley Community Centre [2003] IRLR 434***), confirmed in **Department of Constitutional Affairs v Jones [2008] IRLR 128**

18. In ***Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327***, the Court of Appeal stated the following

> "There is no principle of law which dictates how generously or sparingly the 'power to enlarge time is to be exercised' (para 31). Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case 'is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it'."

19. In Abertawe ***Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** the EAT stated that a claimant seeking to rely on the extension required to give an answer to two questions:

> "The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

20. No single factor, such as the reason for delay, is determinative and a Tribunal should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***

Discussion

21. Whilst the categories set out in ***Selkent*** are not exhaustive, and all matters are capable of being taken into account, they do provide a useful framework to consider the application against. I shall deal with each in turn:

(i) The nature of the amendment

22. The application in so far as section 101A is concerned merely adds a legal label to the facts set out in the Claim Form. That is I consider an amendment which can readily be granted. There is a very strong causative link between the further particulars and original pleading.

23. The application in relation to section 104 adds a little to the facts set out, but the difficulty for the claimant is that she could not set out any occasion when she alleged to the respondent that her statutory right to weekly leave had been infringed. That is what that section is directed to. It appeared to me that if it could not be specified when there had been such an allegation the claim under section 104 had no reasonable prospects of success, but in any event that it added very little if anything to the claim made under section 101A. There was therefore very little hardship to the claimant if that claim under section 104 was not permitted to be added by amendment.

24. The application in relation to section 27 adds what is an entirely new claim to the Claim Form. There is no real causative link between the facts as pleaded and the amendment. For there to be a claim as to victimisation, there are two key facts which must be set out, firstly the basis on which it is said to be on the ground of sex, and secondly and in this instance most significantly what the protected act founded on was. Victimisation is essentially an argument that there has been an unlawful response to something done by the claimant, such as raising a Claim, making a formal grievance, or otherwise. The test is set out in section 27. The claimant was not however able to point to anything that would be a protected act.

(ii) The applicability of time-limits

25. It is not disputed that the claim now made is outwith the primary period in section 123, (there is a related but not identical provision in the 1996 Act) by over 2 months. When considering whether it is just and equitable to admit the claim, the respondent very responsibly accepted that there was no hardship evidentially. It is obvious however that the more extensive the claims the more evidence will be required, and the greater the cost. The

claimant does have the onus of proof in that regard, Whilst at this stage the outcome of any such claim cannot be known, this is not I consider a claim that can be said to be a strong one or have reasonably good prospects of success, such as was the case in the ***Pizza Express*** case. Indeed the second and third matters set out in paragraph 4 above are claims where the claimant has not been able to set out basic and essential requirements. The test in the 1996 Act is not whether it is just and equitable, but whether it was reasonably practicable to have presented the claim on time, and if so whether it was presented within a reasonable time thereafter. Ignorance of a claim is a factor, but a claimant is expected to make reasonable enquiry about the claims that can be made. That can be conducted onllne where there are many resources and sources of information and advice. These factors are I consider all ones that favour the refusal of the application.

(iii) The timing and manner of the application

26. As stated above, the application is made materially late. Whilst the claimant is not legally qualified and is acting for herself, it is set against the statutory period in section 123 of the 2010 Act applicable to the victimisation claim of three months, which is comparatively short. These considerations favour the refusal of the application

(iv) Analysis

27. None of the factors are determinative in themselves. I accept that the claimant will suffer the potential for hardship if she is not able to make a claim which she wishes to and that the respondent did not argue for hardship particularly. That does not however mean that the application should be allowed. I require to weigh all the facts. What appears to me to be the two most significant factors are firstly that for the second and third matters referred to in paragraph 4 the claimant was not able to set out an essential element of the claim, such that it appears on the information before me that those claims simply cannot succeed, which in turn means that it is not in accordance with the overriding objective for parties, and the Tribunal, to spend time (and for the parties cost) in addressing those claims, and secondly that separately the claimant has the claims under

section 101A of the Employment Rights Act 1996, and section 13 of the Equality Act 2010, which allow her to raise almost all, and perhaps all, of the matters she wishes to complain about. That alternative source of potential remedy is a material matter in exercising the discretion, in circumstances where the claimant seeks to introduce new claims which are otherwise out of the primary time limit.

28. In all these circumstances I have concluded that it is not in accordance with the overriding objective to allow the application for matters (ii) and (iii) but to do so for matter (i).

29. Separately the claimant confirmed that she did not have the service necessary to claim “ordinary” unfair dismissal and that she had received payment of her claim to notice such that no claim for breach of contract arises, and without opposition from her I have struck out those two claims under Rule 37 as having no reasonable prospects of success.

Conclusion

30. The application to amend is granted for matter (i) and otherwise refused.

Employment Judge: **Alexander Kemp**
Date of Judgment: **03 March 2021**
Date sent to parties: **08 March 2021**