EMPLOYMENT TRIBUNALS

Claimant: **Louise Griffiths**

Respondents: **The Commissioner of Police of the Metropolis**

Heard at: **London South (by CVP)** **On:** **17 November 2022**

Before: **Employment Judge Cheetham KC**

Representation

Claimant: Ms L Veale (counsel)
Respondent: Mr O Isaacs (counsel)

JUDGMENT

1. The application to amend to include the PCPs at paragraph 4 of the Further Particulars is allowed in respect of paragraph 4(1), (2) and (6) only.

2. The application to amend in respect of the further detriments at paragraph 8(1), (2) and (8) of the Further Particulars is refused.

3. The case is listed for a further Preliminary Hearing on **25 January 2023** at 2p.m. (2 hours), to be held by video.

REASONS

1. This is a claim that was received by the Employment Tribunal on 28 June 2021. The Claimant's employment commenced on 17 February 2005 and she is employed as a Digital Forensic Specialist.

2. The Claim Form and particulars of claim – which the Claimant completed herself – raise complaints of victimisation and indirect sex discrimination. The particulars of claim set out a detailed narrative, are well-articulated and identify the complaints being made, even if they lack the precise legal framework that

a lawyer would provide.

3. The Grounds of Response (4 August 2021) provide a defence to the complaints of victimisation and indirect discrimination. However, the Respondent stated in respect of both complaints that they had not been sufficiently particularised. The Respondent then served more detailed Amended Grounds (20 August 2021) and included an application to strike out the claim, alternatively seek a deposit order.

4. This Preliminary Hearing was listed and the claim has also been given a listing for the full merits hearing (9-13 October 2023), together with suggested case management orders. Although the Respondent asked whether this hearing could consider the strike out application as well, EJ Ferguson ordered that it should remain a closed Case Management Hearing (7 November 2022).

The Claimant's further information

5. The Claimant served Further Particulars of the Claim, which had been drafted by her counsel (14 November 2022). In respect of the indirect sex discrimination claim, these identified 13 "PCPs" (provisions, criteria or practices), each cross-referenced to a paragraph in the Particulars of Claim. In respect of the complaint of victimisation, 8 detriments were identified, again cross-referenced to the particulars of claim.

6. At the start of this hearing, Mr Isaacs submitted that the Claimant needed to make an application to amend her claim, whereas Ms Veale said these were just further particulars of a claim that had already been pleaded. Deciding who was correct in that initial exchange required the tribunal to carry out the same exercise that would be necessary if there were an application to amend.

7. Therefore, the tribunal decided that an application to amend would be necessary and, with the agreement of the parties, Ms Veale proceeded to make that application. It was restricted to the indirect sex discrimination claim and the detriments listed at para. 8(1), (2) and (8) of the Further Particulars of the Claim.

The law

8. In the recent case of ***Vaughan v Modality Partnership*** [2021] ICR 535, EAT, HHJ Tayler provided guidance on the correct approach to adopt when considering an application to amend. He referred to ***Cocking v Sandhurst (Stationers) Ltd*** [1974] ICR 650 and to ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836, which has the well-known words of Mummery LJ:

> *"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."*

9. HHJ Tayler noted that the list of relevant factors set out in ***Selkent*** did not mean that tribunals should adopt a check-list approach, as emphasised by Underhill LJ in ***Abercrombie v Aga Rangemaster Ltd*** [2014] ICR 209, CA. That case

also contained this useful passage (at §48).

> *"… the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to 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."*

10. At §21 of ***Vaughan***, there is this summary of the correct approach to take:

> *"Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the **Selkent** factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis of instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim."*

11. At §22, HHJ Tayler went on to say:

> *"Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later."*

12. Finally, he gave a reminder that no one factor is likely to be decisive. The balance of justice is always key.

13. On the issue of indirect discrimination, Mr Isaacs drew the tribunal's attention to ***Ishola v Transport for London*** [2020] EWCA Civ 112. At §37, the Court stated: "*If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process*

of abstraction into the application of a discriminatory PCP."

The parties' submissions in summary

14. For the Claimant, Ms Veale started with the victimisation claim and submitted that (by reference to the Particulars of Claim):

    (i) the protected act was agreed and all the further information did was to re-arrange facts that had already been pleaded;

    (ii) there was an implied causal link between the protected act and detriments (1), (2) and (8); and

    (iii) in any event, there would be no prejudice to the Respondent if these allegations were included.

15. As pleaded in the Particulars of Claim, the indirect sex discrimination claim did not "follow the process", but all the facts were pleaded and this was just re-labelling those facts as the PCPs. Ms Veale emphasised that the Claimant drafted the pleadings herself and that all her lawyers had done was re-shape them into the correct legal framework. She also focused upon what she described as the limited practical consequences of allowing the amendment.

16. For the Respondent, Mr Isaacs had provided written submissions, which he developed in his oral submissions. He said that this was not an opportunity to amend "by the back door" (relying upon ***Yorke v GSK Services Unlimited*** EA-2019-000962).

17. In summary, as to the indirect discrimination claim, he relied upon ***Ishola*** and said that, for a PCP to be established, there must be some form of continuum, in the sense of how things generally are or will be done by the employer. Whilst it is right that the Claimant complained about what happened to her, that is very different to identifying each complaint which is now raised as a PCP, applied to both men and women, but which has a disparate impact on women.

18. He also pointed out that there must be a causal link between the PCP and the disadvantage and submitted that the Claimant's Further Particulars did not grapple with the PCPs relied upon, the comparator group and nor did they identify the disadvantage for each PCP. For example, in respect of PCPs 4(8) and (9) it was almost impossible to identify how there was any disparate impact in refusing to tell a complainant about discrepancies.

19. The "new" detriments, he submitted, had previously been background only and the amended version did not make clear who the detriments were aimed at.

20. Mr Isaacs also focused upon the practical impact of allowing the amendment and submitted that the amendment would significantly prejudice the Respondent, as the scope of the claim would be expanded. This would increase the number of witnesses needed and the length of the hearing. He made the point that, even if the amendment was allowed, there was still essential information missing.

Discussion

21. The decision was reserved, not least because it was not a straightforward decision, given that there are clearly cogent arguments both for and against (which have only been summarised above).

22. The fact that the Claimant drafted the particulars of claim herself carries relatively little weight in this case, because she provided a clear narrative setting out what she was complaining about. She also clearly identified that, "*The claim of indirect discrimination relates to the fact that the investigation into the sexual assault did not follow the process, was not carried out effectively, and my case was unfairly compared to other cases that had been lost by my employer*". The claim of victimisation was also clearly described as what allegedly happened to her after she complained. Paragraphs 28 and 29 summarised those two claims.

23. Indirect discrimination. The first question is whether the amendments raise anything new or simply re-label what is already pleaded. Anything now labelled as a PCP that related to the investigation process would potentially amount to re-labelling. This is subject to the important proviso that it did not amount to a fact-specific complaint by the Claimant, rather than what could be seen as a neutral PCP that applied to any complainant.

24. On that basis, the tribunal found that the PCPs at para. 4(1), (2) and (6) could be described as re-labelling practices that related to the investigation process and which had already been pleaded. These amendments are therefore allowed.

25. The other "PCPs" are very much fact-specific complaints about the Claimant's own treatment and would not amount to neutral PCPs that applied to any complainant in equivalent circumstances, save for number (11). That one refers to a PCP of not taking into account other instances of misconduct, but the pleaded case is that the practice of the disciplinary process is to allow allow for this.

26. As allowing the amendment application to include these other PCPs would mean there were "new" PCPs, would refusing the application prevent the Claimant getting what she needs (to paraphrase ***Vaughan***)? In other words, has she shown the real practical consequence of refusing the amendment? In the tribunal's judgment, the Claimant has not done so.

27. It is no answer to say that, at the final hearing, the Respondent will have to deal with all of this anyway. There is a significant difference between a fact that forms part of the narrative of a claim and one that is said to show a practice that founds a claim for indirect discrimination. It may not be necessary to call any evidence to rebut the former, particularly if it is just by way of background, whereas the latter will certainly require evidence.

28. Further, even if the tribunal was wrong and these additional PCPs were not

squarely fact-specific, it is difficult to see they would have any sufficient prospects of success as indirect discrimination complaints. Taking para. 4(3) as an example, the PCP is said to be, "declining a complainant's request that the data seized from her mobile phone be deleted". First, it would need to be established that there was such a practice. Secondly, it is difficult to see how this creates a disparate impact. While it may arguably do so, there has been no attempt to particularise this further.

29. This means that, even if the application to amend was allowed in full, there would still need to be further particulars to allow the Respondent to understand the case it had to meet.

30. Therefore, the application to amend to include the PCPs at paragraph 4 is refused, save in respect of para. 4(1), (2) and (6).

31. Victimisation. Turning to the detriments ((1), (2) and (8)), these form part of the narrative of the Particulars of Claim, but they are not identified in the Particulars of Claim as being consequent upon the Claimant's complaint of a sexual assault. They are no more impliedly linked than other matters of which the Claimant complains.

32. Therefore, as these are "new" allegations of victimisation, one must ask whether the Claimant has explained why the amendment is of practical importance because, for example, it is necessary to advance an important part of the claim. The answer is that she has not done so. There is already a clearly defined victimisation claim with 5 alleged detriments. These further 3 detriments will lead to additional disclosure and witness evidence, which may not be substantial, but that is still a relevant consideration, particularly if it extends the amount of time needed for the final hearing. In addition, there is a limitation issue with regard to detriments (1) and (2).

33. It follows that the application to amend in respect of the further detriments at paragraph 8(1), (2) and (8) of the Further Particulars is not allowed.

Other matters

34. A further Preliminary Hearing has been listed for **25 January 2023** at 2 p.m. (2 hours). That hearing will consider the application to strike out the claim, but the Respondent should confirm whether or not it wishes to proceed with that application in light of this Judgment. If it does not, then the parties should also confirm to the tribunal whether that hearing should be vacated or whether it remains necessary for case management.

35. Finally, the tribunal mentioned to the parties that it was surprising there had been no application for any order under Rule 50, given the subject matter of the complaint and the identification of the alleged assailant. No orders were sought or made at this hearing, but the parties are encouraged to give it some thought.

Employment Judge Cheetham KC
Date 5 December 2022