EMPLOYMENT TRIBUNALS

Claimant: Ms K ATHERTON

Respondent: (1) REYNOLDS COLMAN BRADLEY LLP
(2) STEVEN JOHN REYNOLDS
(3) JOHN WILLIAM BRADLEY (claim dismissed)
(4) PAUL ADRIAN SPIBEY

Heard at: London Central (in private; by cloud video platform)
On: 4 April 2023

Before: Employment Judge Nash

Appearances
For the claimant: Mr Jason Braier of counsel
For the respondent: Mr Ryley, solicitor

The case management order made on 4 April 2023 having been sent to and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The tribunal refused the claimant's application to amend to include a claim that the respondents subjected her to the following treatment:-
   1.1 On 1 March 2022, the Claimant sent the Management Board an email entitled "RCB Pathway to the Future" in which she included a suggestion that there be an updated draft engagement survey. Mr Reynolds dismissed the Claimant's idea out of hand;
   1.2 On 7 April 2022, Mr Reynolds emailed the Claimant in an accusatory manner about her role in what he considered to be an unduly negative profit forecast;
   1.3 On 28 April 2022, in email correspondence with the Claimant about why the Claimant said in an earlier email that she did not believe Claire Collinson could work with Mr Bradley, Mr Reynolds berated the Claimant in his reply by saying 'As ever, more opinionated, judgmental criticism'.
   1.4 By reason of Mr Reynolds' actions the claimant gave notice of retirement.

2. The claimant was employed by the first respondent, a firm of solicitors as a solicitor from 26.4.16. By the date of termination, 29.7.22, the claimant was a full equity partner. Acas early conciliation against the first respondent was from 31 July to 2 August 2022 and against the other three respondents from 8 to 10 October 2022. The claim form was presented on 12.10.22. The claimant had taken legal advice previously but drafted her claim form herself.

3. At this preliminary hearing, after hearing from the parties, the tribunal determined that all allegations within the claimant's draft list of issues of 4.4.23 were contained in the claim form and no amendment was necessary, *save* for the allegations set out at 1.1 to 1.4 above.

The application to amend

4. The claimant contended that allegations 1.1 to 1.3 were additional factual allegations and examples of the respondents undermining the claimant. It was accepted that the application was made out of time. However, although the merits of the allegations were not determinative, they were relevant. There was a good prospect that the tribunal would find that the allegations 1.1 to 1.3 amounted to a course of conduct, if one existed, with the in time allegations. If not, it would be just and equitable to extend time to consider the allegations. The fact that an amendment is made out of time is but one factor for the tribunal to consider and is not determinative. The application was made at a relatively early stage in proceedings. No final hearing date was prejudiced. The respondent would need to submit an amended grounds of resistance in any event.

5. It was accepted that allegation 1.4 was more material. However, it formed part of the story the claimant told in her claim form. The balance of injustice and hardship was in the claimant's favour.

The respondents' objection

6. In reply, the respondents relied on the Presidential Guidance on amendments. The tribunal should consider the nature of the amendment sought. It was significant and considerably enlarged the claim. The amendment was sought in the context of a significant number of documents prior to this hearing. The pleadings were thorough but there was no reference to any of the matters now sought to be added. The amendment constituted a fresh claim.

7. There was no reason why the amendments could not have been made in time. At the time of the claim form, the claimant had previously taken legal advice and she herself was a qualified litigation solicitor.

8. The timing and manner of the application put the respondents to material prejudice. The application to amend was made only two hours before this hearing putting the respondent at a significant disadvantage; until two hours before this hearing, the

respondents reasonably understood they were facing a harassment and victimisation claim.

9. In reply to the tribunal's enquiry the respondents accepted that they could not point to any specific prejudice caused by the late amendment such as a lost opportunity to proof a witness or preserve documents.

10. The tribunal directed itself in line with the EAT authority of *Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT*, that it must consider all relevant factors assessing the balance of hardship and injustice, there were three factors which generally will be relevant : the nature of proposed amendment, relevance of time limits and the timing and manner of application for amendment.

11. The tribunal had regard to the guidance given in *Vaughan v Modality Partnership 2021 ICR 535, EAT* that the core factors are the balance of injustice and hardship and it must have regard to the practical consequences of allowing or refusing the amendment.

12. The tribunal considered all the circumstances going to the balance of hardship and prejudice. It firstly considered the nature of the amendments. It accepted the claimant's argument that the first three amendments added further examples of conduct already pleaded. However, the final amendment introducing the retirement was more significant. The claimant made reference in the claim form to her retirement but expressly did not plead it as an act of discrimination. The respondents were correct that the claimant had provided considerable information about her claim, and yet sought to add amendments.

13. It was not disputed that the amendments were sought well out of time. The statutory time limit expired in early November 2022 and the application to amend was not made until 4 April 2023, 6 months out of time, twice the original time limit. There was no good reason why the new matters could not have been brought in time, in common with the original matters. The amendments related to facts of which the claimant had been fully aware at the time. There was no legal complexity which might make it difficult for a claimant unrepresented by specialist employment lawyers to state her case. Further the claimant was a qualified solicitor and a litigator who had previously taken specialist employment legal advice.

14. The tribunal accepted the respondents' contention that the timing and manner of the amendment created further prejudice. The respondents, although legally represented, had not had sufficient time to consider the amendments and their likely effect. It was not made clear - as it could easily have been - prior to the hearing that the claimant was seeking an amendment. The amendment application was in effect made by way of a list of issues, not for instance further and better particulars or a written application to amend, seeking the respondents' agreement. This lack of clarity increased the prejudice to the respondents.

15. The tribunal considered the real practical impact of permitting or refusing the amendment applications. Permitting the amendments would likely add to the length and

complexity of the final hearing. Refusing the amendment would result in the claimant being unable to bring four extra acts of discrimination. She would lose in effect part of the claim she wished to make. However, permitting the amendment would expose the respondents to further allegations and potential legal liability.

16. The tribunal considered that granting the retirement amendment would have the probable practical consequence of increasing the length and complexity of the proceedings. The retirement was a new matter and would require discrete evidence and consideration. The unamended claim was lengthy and would likely require considerable expense from the parties and considerable tribunal resources. (In the event the tribunal listed the unamended claim for a ten day final merits hearing). This was a case with three respondents, including two individuals, albeit sharing representation.

17. The tribunal considered the application for the first three amendments to be more finely balanced as they were less likely to considerably increase the length of the hearing. However, the amendments were simply further examples of conduct already pleaded. The tribunal would in any event consider a number of examples of such conduct. The prejudice to the claimant in not relying on these matters as acts of discrimination was relatively minor. Such prejudice would be somewhat mitigated by the fact that she could rely on them as background when the tribunal considered the other examples in the unamended claim.

18. The tribunal accepted that the timing and manner of amendments put the respondents at a material disadvantage in arguing their case before this tribunal.

19. In these circumstances, the tribunal refused the applications for amendment.

Employment Judge Nash

20 April 2023

Sent to the parties on:

20/04/2023

For the Tribunal Office: