EMPLOYMENT TRIBUNALS

Claimant: **Emma Hawkes**

Respondents: **Network Rail Infrastructures Limited**

Heard at: **London South (by CVP)** **On:** **28 February 2023**

Before: **Employment Judge Cheetham KC**

Representation

Claimant: in person
Respondent: Ms Laura Jackson (solicitor)

JUDGMENT

1. The application to amend the claim is allowed in respect of points 3 and 4, as set out below, but the remainder of the application is refused.

REASONS

1. This application was heard during the Preliminary Hearing, the remainder of which is summarised in the accompanying Order.

<u>The Law</u>

2. 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."*

3. 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."*

4. 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."*

5. 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."

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

<u>The application</u>

7. The application was made on 20 October 2022. It is in 6 parts, as follows.

8. First, the Claimant refers to ongoing discriminatory behaviour by the appeals manager, although without providing dates and details. By definition this post-dates the claim, which was filed on 16 March 2022, so there is an obvious issue over timing. In addition, as became clear during discussion of the further particulars, the Claimant is essentially making a further claim, given the number of allegations she makes post-dating the ET1. The practical consequence is that allowing the amendment would double the timeframe of the claim, but there would still need to be further particularisation of dates. This amendment is not allowed.

9. Secondly, there is reference to the Claimant having raised grievances, but no cause of action is identified, so this second part does not amount to an amendment, but is more a commentary on what has been happening.

10. Thirdly, the Claimant has received documents via a Subject Access Request which indicate that the grievance manager recommended disciplinary action against her for discussing the grievance. This is therefore a further detriment to the existing victimisation claim, of which the Claimant was previously unaware. Although Ms Jackson objected on the basis that this should have been included in the ET1, it appears that it could not have been and the amendment is allowed. Having to deal with it causes no practical difficulty to the Respondent. It should therefore be added to the list of issues.

11. Fourthly, the Claimant has provided some further detriments arising as a result of the grievance (which is a protected act). These are that the appeals manager obstructed the investigation into the grievance by (a) not securing the CCTV and (b) by not providing the rosters. These amendments are also allowed and should be added to the list of issues.

12. Fifthly, the Claimant has provided some documents about news coverage, but this does not amount to an amendment.

13. Finally, she has provided some background about the appeals manager, but this also does not amount to an amendment.

14. It might be said that these amendments still lack the particulars that one would want to see in terms of dates and details. However, one has to approach this pragmatically, allowing for the fact that, if the Respondent is simply not able to respond to an allegation because it is too vague or unspecified, then that allegation cannot succeed.

15. The Claimant also sent another email to the tribunal on 25 January 2023, which referred to health and safety breaches. However, these do not fall within the tribunal's jurisdiction.

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Employment Judge Cheetham KC

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Date 2 March 2023