



EMPLOYMENT TRIBUNALS

Claimant: Ms L Wyles

Respondent: Cygnet Health Care Ltd

Heard at: Leeds Employment Tribunal (via CVP) **On:** 19 July 2023
Employment Judge K Armstrong

Before:

REPRESENTATION:

Claimant: In person

Respondent: Ms R Senior (Counsel)

JUDGMENT on the claimant's amendment application having been given orally at the hearing and sent to the parties and a request having been made at the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides the following

REASONS

Background

1. These reasons reflect the decision given orally at the hearing on 19 July 2023. They are not a verbatim record of that decision. The claimant was permitted to audio record that hearing as a reasonable adjustment. These written reasons will not exactly reflect that recording but are an accurate record of the reasons for my decision.
2. In her claim form submitted on 9 December 2022 the claimant brought claims for protected disclosure detriment, automatic unfair dismissal (protected disclosure) and indirect disability discrimination.
3. At a previous case management hearing on 27 April 2023 the issues in the claimant's protected disclosure (or 'whistleblowing') claims were identified save that the claimant indicated an intention to make an application to amend her claim to provide further particulars of the dates and content of alleged protected disclosures made during 2021 and 2022.

4. At the same hearing, the claimant requested some time to file further particulars setting out the legal basis for her disability discrimination claim.
5. Directions were made for the claimant to provide any application to amend her claim by 8 June 2023, and at the same time to explain why the additional information was not included in the claim form.
6. Unfortunately, following the hearing on 27 April 2023 an incorrect copy of the Case Management Order was sent to the parties. This presented particular challenges to the claimant given her disabilities (autism spectrum disorder (ASD) and attention deficit hyperactivity disorder (ADHD)). The correct copy was provided to the parties on 16 June 2023.
7. On 27 June 2023 the claimant provided a draft amended claim form. There was no separate document explaining why the additional information was not included in the original claim form. No issue was taken by the respondent with the late filing of the application given the issues with the delay in providing the correct case management order. Although not explicitly dealt with at the hearing, I granted additional time for the application to be made and proceeded to consider the amendment application at the hearing on 19 July 2023.

Amended claim

8. The draft amended particulars of claim comprise 223 paragraphs on 34 pages. The original particulars of claim comprise 25 paragraphs on 7 pages. The claimant confirmed that the first 149 paragraphs of the proposed amendment are narrative, and the basis or substance of her claim is set out at paragraph 150 onwards. She sought to submit the document as a substitution for the original details of claim, although there was some overlap between the two documents. Unfortunately, the differences were not entirely clear from the proposed draft as the claimant had attempted to submit them with track changes but this is not visible on the version submitted. It was however apparent that there are a significant amount of changes.
9. I address the application to amend the protected disclosure detriment and automatic unfair dismissal claims first, then the application to amend the disability discrimination claim.
10. In doing so, I take into account the factors identified in the presidential guidance on case management, and the case law referred to by the parties in the course of submissions.
11. I heard representations from Ms Wyles and Ms Senior before making my decision, and I took everything said into consideration, although I don't repeat it in detail here.

Protected disclosure detriment and automatic unfair dismissal claims

The nature of the proposed amendment:

12. At the previous case management hearing, it was envisaged that the proposed amendment would include particulars of a relatively limited number of disclosures during 2021 and possibly a small number of further disclosures during 2022.
13. In the amended claim form a significant number of further alleged disclosures have been identified. It is not easy to identify all the disclosures but it appears there are something in the order of 24 further disclosures now alleged (although the respondent's representative identifies 43), in addition to the original eight set out on the claim form and identified in the previous list of issues.
14. The subject matter of the alleged disclosures has also been expanded. The disclosures set out in the original claim form all relate to the respondent's resuscitation and incident management policies and practices. Some of the further alleged disclosures appear to relate to issues regarding managing autism, covid management and issues regarding management of particular patients as well as resuscitation and incident management. The claimant submitted that the autism aspects did not relate to her whistleblowing claim and that the covid management and specific patient issues were an expansion of information regarding her concerns about resuscitation and incident management. In any event, the claimant acknowledged that this was a provision of further factual information or background.
15. The amended claim form identifies something in the order of 18 detriments, compared to the original five detriments identified at the previous case management hearing.
16. There are also a significant number of further individuals identified as being involved in the claim either by way of receiving disclosures or being the subject of those disclosures, increasing from six identified individuals in the original claim to 13 in the amended claim.
17. I readily accept what the claimant says in that the detail in the proposed amended claim was provided in an attempt to be thorough rather than prolix, wordy, or to ambush the respondent with additional information.
18. However, the role of the Tribunal is to do justice to both parties, and also to deal with cases in a proportionate manner. There is a large amount of additional information in the proposed amended claim. I consider that the further information does amount to new claims – there are new facts pleaded, new disclosures regarding new issues and to new people, and new detriments pleaded.

Balance of hardship and prejudice to the parties

19. In light of the above, to allow the amendments in full or in part would overcomplicate the issues in this claim and produce significant challenges to

the respondent in responding to the claim and for the Tribunal in identifying (and therefore determining) the issues between the parties.

20. The claimant makes the submission that although this information is new to the Tribunal, it is not 'new' to the respondent in that it relates to incidents which in fact (on her account) have already happened in the past and therefore there is no prejudice to the respondent in responding to them. I understand the point, however, investigating the allegations within Tribunal proceedings, identifying and providing the information to respond to these allegations in terms of documents and witnesses, and determining and setting out a legal response to them, will take considerable time and expense.
21. On the other hand, in refusing the application to amend, the claimant's claim remains as it stands on the original claim form and as identified at the previous case management hearing. The claim in that format is clear.
22. Including further dates of disclosures and further alleged detriments is unlikely to substantially affect the claimant's remedy if the claim is successful, or the likelihood of the claim succeeding. I do take into account that there is risk that the Tribunal at a final hearing might not find some of the pleaded disclosures and detriments are made out, and that a Tribunal conversely might have found some of the proposed amended incidents to be established. But balancing this against the need for clarity in the claim, the challenges to the respondent of responding, and in fact the benefit to the claimant of having a clearly identified claim, I am satisfied that the balance of prejudice falls against permitting the amendment.
23. I have considered whether the amendment could be limited to identification of dates of disclosures during 2021. However, I am not satisfied that this would be in the interests of justice. It is very difficult to extricate those dates from the proposed amendment without involving the issues of attempting to identify what if any further detriments are alleged to flow from them, and involving further individuals, and expanding the factual matters which the disclosures relate to. Also, I consider that the risk of prejudice to the claimant is minimal as these disclosures pre-date the disclosures already identified.

Time limits

24. The proposed new claims are now significantly out of time. If I were to allow the amendment I would have allowed it subject to a condition that the issue of time limits would be determined at the final hearing. This affects the merits of the amended claims, in particular the alleged disclosures in 2021. Time limits therefore were a factor that weighed in the balance against allowing the amendment.

Timing and manner of application for amendment

25. As set out above, the amendment application was made following directions for any such amendment at the last hearing, but went beyond what was envisaged at that hearing.

26. The claimant did not set out in writing her reasons for not including these details in the original claim but I allowed her to do so orally at this hearing. She referred to submissions she had made at a previous hearing and that she did not realise that she would need to repeat those on this application. In summary, the claimant stated that since lodging her claim she has looked at documents and emails she holds again, and identified a number which she previously did not consider to be protected disclosures that she now does. She also stated that her understanding of the law and process has improved and therefore this has led her to set out the claim as now pleaded.
27. Again, I accept that the reason for the amendment is due to the claimant's evolving understanding of the law and procedure rather than any deliberate attempt to ambush the respondent. However, I am not satisfied that this is a sufficient reason to permit the amendment when considering all the factors in the case as set out above. In particular, the claimant demonstrated a clear understanding of the nature of her whistleblowing claim at the time of lodging her claim, as set out in the original claim form. She now relies on further facts which were available to her at the time of the original claim.

Conclusion regarding whistleblowing claims

28. The application to amend the claimant's claims for protected disclosure detriment and automatically unfair dismissal is refused.

Indirect disability discrimination

Nature of the amendment

29. At the previous case management hearing the claimant requested time to prepare amended particulars of claim to set out the legal basis for her disability discrimination claim. In particular, to consider whether an amendment would be sought to add a claim for failure to make reasonable adjustments and/or discrimination arising from disability and if not to set out the provision criterion or practice (PCP) and particular disadvantage relied on in respect of the indirect disability claim.
30. No amendment is sought to add a claim for discrimination arising from disability or failure to make reasonable adjustments. Since the last hearing the claimant has provided medical information and a disability impact statement and the respondent has confirmed that it does not dispute that the claimant is disabled.
31. The original claim clearly identifies an indirect disability discrimination claim. It identified the claimant's disability (ASD and ADHD). It sets out that the claimant is at higher risk of stress because of autism and significantly disadvantaged by the respondent's failure to conduct a stress risk assessment (at paras 13 and 24) and refers to her absence due to stress at work (at para 27).

32. The proposed amendment identifies the PCPs relied on (the respondent's stress management approach, disability discrimination policy, and policy writing standards). It also clarifies the substantial disadvantage claimed by the claimant and the reason for that.
33. I am therefore satisfied that this is not a new claim but clarification of an existing claim.

Balance of hardship and prejudice

34. As there is already an indirect discrimination claim before the Tribunal, and the proposed amendment provides clarity as to the basis for that claim, there is limited prejudice to the respondent in having to respond to the amended claim. The claimant has already established and the respondent has quite rightly accepted that she is disabled. The issues related to this claim are therefore clearly defined and relatively limited. The further detail set out in the amendment is unlikely to significantly increase the amount of time required to respond to and determine the claims. On the other hand the prejudice to the claimant in not permitting her to identify the particular PCPs and clarify the particular disadvantage she faces would result in her claim being less clear for the Tribunal.

Merits of the claim

35. I make no finding as to the overall merits of the indirect disability claim but taken at its highest on the pleaded amendment there appears to be a legally arguable case. There is a need to case manage the claim to identify the issues but this will be achievable on the basis of the amended claim. (Case management was completed successfully following this decision at the hearing on 19 July 2023).

Timing and manner of application for amendment

36. The claimant's reasons for amending the claim are similar to those set out above in respect of the whistleblowing claim. However in respect of the disability discrimination claim, rather than reconsidering the evidence and identifying further facts relied on, the claimant has taken time to formulate her case on the same basis as originally set out, but with some further detail to clearly match up her claim with the statutory tests. The proposed amendments at paragraphs 206-217 do this in a succinct and manageable format.

Time limits

37. As this is an amendment to an existing claim as opposed to an amendment to bring a new claim, the issue of time limits will be dealt with at the final hearing on the basis that the claim was brought on the date that the ET1 was presented.

Conclusion

38. I grant permission to amend the claimant's claim for indirect disability discrimination by inserting the new paragraphs 206-217 inclusive at the end of the original details of claim.
39. I refuse permission to include paragraph 218 which states that further incidents of discrimination will be provided in the claimant's witness statement. The claimant's claim needs to be identified today.
40. I refuse permission to amend the claim to add paragraphs 219, 220 and 223. These are the same in content as paragraphs 24 and 25 in the original particulars of claim and it would unnecessarily complicate matters to amend them.
41. I allow permission to include paragraphs 221 and 222 regarding the ACAS uplift. This is an issue which would be considered by the Tribunal in remedy in any event and it is of benefit to the parties for it to be set out clearly at this stage.

Employment Judge Armstrong

Date: 21 July 2023