



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **MS. ELLY ZHANG**

and

HELIOCOR LTD

First Respondent

HELIOCOR CONSULTING LTD

Second Respondent

Employment Tribunal Judgment

16 November 2020

Employment Judge Russell

Judgment

1. The Claimant's application for a reconsideration of my judgement of 16 September is out of time under Rule 71 of the ET Rules and there is no ground to extend time under Rule 5 or otherwise .
2. In respect of the Claimant's application for a reconsideration of my judgment of 16 September and in any event I further confirm my original decision under Rule 70 of the ET Rules to refuse the addition of Mr Tripathi as a respondent in these proceedings .
3. In respect of the Claimant's application under Rule 34 of the ET Rules to amend her claim to include Mr Hall and or Mr Tripathi as a respondent(s) in these proceedings I refuse the Claimant's application.
4. The Claimant had a full opportunity to make representations at the case management hearing of 11 September and it is not in the interests of justice to set aside those orders or judgement and the Claimant's application under Rule 29/30 of the ET Rules is also refused .

Background

5. I heard this matter at a Preliminary Hearing on 11 September leading to a Judgment and case management orders of 16 September. There was then a further Open Preliminary Hearing (heard by Employment Judge Pearl on 12 October). Both

parties were represented at these online hearings. The case remains listed for a full Tribunal hearing for 4 days on 12,13,14,15 January 2021.

6. The case, aside from the applications referred to below and being considered for this judgment, had been stayed until 13 November 2020.
7. The Claimant made three applications as of 15 October 2020
 - I. An out of time application for reconsideration of the 16 September decision not to add Mr Tripathi as an individual respondent, under rules 70-71 of the ET Rules.
 - II. Alternatively, an application to vary or set aside the 16 September decision not to add Mr Tripathi as an individual respondent, under rules 29-30 of the ET Rules.
 - III. A new application to add Messrs Tripathi (MD of the First Respondent) and/or Mr Hall (CEO of First Respondent) as individual respondents in respect of the Claimant's race discrimination claim under rule 34 of the ET Rules.
8. In the light of these applications I have, in particular, reconsidered my Judgment of 16 September and decision not to add Mr Tripathi as a party to the proceedings (first considered by me on 11 September) and considered an application to add Mr Hall to the proceedings (an application first anticipated in the hearing before EJ Pearl on 12 October). Both individuals were employees of the First Respondent at all material times. I have considered EJ Pearl's judgement following the hearing on 12 October and have carefully read the Claimant's application for reconsideration and to amend the claim and the First Respondent's response to it with supporting documents and authorities in each case. I have determined that the Claimant's three applications are all refused/unsuccessful for these reasons.

Reasons for my Judgment

Reconsideration Application out of Time

9. The Claimant's application for reconsideration was not made at the original hearing of 11 September and so should have been submitted by 30 September and was therefore some two weeks out of time in breach of Rule 71 of the ET Rules. The Claimant has been legally represented throughout this period. There is no evident substantive reason for the delay in the application for reconsideration of the 16 September decision (seeking to add Mr Tripathi as an individual respondent) and I do not find it is necessary in the interests of justice to extend time and do not do so. I have however nevertheless also considered the application on its merits in order to ensure fairness to the Claimant by resolving the point substantively.

Additional Parties

10. At the PH on 11 September 2020, both the Claimant and the First Respondent were represented by solicitors . She was fully heard on that occasion as to the position of Mr Tripathi and made no application to join in Mr Hall as a party.
11. Although the Claimant's representative states the Claimant submitted her ET1 as a litigant in person without having had advice as to her employment rights at that time (thus in part explaining why the individual respondents were not then added) both Mr Tripathi and Mr Hall were referred to specifically in the ET1 and could have been joined in the proceedings then . And the Claimant stated on 11 September that she was aware that she could have included Mr Tripathi as a respondent if she had wished. She may not have been aware of this at the time of lodging her complaint but if so then she should have been so aware.
12. Although the Claimant is correct to state that under, s.109/110 of the Equality Act 2010 employees and agents may themselves be personally liable and that in these circumstances, any "individual perpetrators can (and often are) joined to the proceedings as a separate respondent(s) at the case management stage in accordance with r.34 ETR" , the fact is , they were not . Nor were they , of course , joined as respondents at the instigation of the claim .

Material Facts/Change of Circumstances

13. I do not accept there has been a material change of circumstances since my 16 September decision that justifies varying or revoking it. In particular, neither the fact that the First Respondent seeks to argue , in part , as to the shareholding of the Second Respondent nor the small deposit order now applied to the Claimant in respect of one of her claims (relating to holiday) amount to a material change that does or may justify me changing my decision not to allow the application to join Mr Tripathi as a party to proceedings.
14. I note that EJ Pearl did not accept the First Respondent's argument that the Claimant's claim to have been employed by First Respondent had little reasonable prospects of success. I also note his determination that the WhatsApp message examples, sent by Mr Tripathi might amount to harassment depending on the evidence . But neither finding is material to my original decision other than perhaps adding substance to the decision not to include Mr Tripathi as both Respondents remain as parties to the full hearing including the employer of both Mr Tripathi and Mr Hall .And both will also no doubt give evidence .
15. As far as Mr Hall is concerned the Claimant did not seek to join Mr Hall as a party at the 16 September hearing and he is not named in respect of any specific allegations in the Claimant's ET1. As there are no express allegations of discrimination against Mr Hall there is no basis to join Mr Hall as a respondent to the Claimant's race discrimination claim and there has been no explanation why the application to join him is made at such a late stage or why it was not made on 11 September.
16. As far as both Mr Hall and Mr Tripathi is concerned there are no new material facts that have arisen that the Claimant has become aware of, since the September hearing. The Claimant may be concerned as the conduct of the First Respondent , then and now and as to (in her mind) an anticipated attempt to undermine her claim

by putting the second respondent into insolvency , but her scepticism is speculative and longstanding . Certainly, no new material facts have emerged since 11 September , even if the position evolves as one might expect , to justify a reconsideration of the decision not to join in Mr Tripathi as a respondent.

Balance of Prejudice

17. I did consider the balance of prejudice (noting the Claimant's reference to the case of *Orford v S Three Staffing UK Ltd UKEAT/0058/13*) when determining whether to grant the then application to join Mr Tripathi to the proceedings as a respondent on 11 September. And I also then took account of the Presidential Guidance on General Case Management . In considering prejudice , the Tribunal must consider any prejudice suffered by all affected parties/individuals. It is not necessarily the case that the Claimant will suffer greater prejudice if the applications are refused than Mr Tripathi and Mr Hall if they were accepted. Adding them into the proceedings as respondents puts them at a significant potential prejudice and the Claimant already has a claim against the First and the Second Respondent which proceeds to a full hearing .
18. I take account of the decision in *Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650* reminding me that a new respondent should only be added or substituted where a tribunal is satisfied that a "genuine mistake" has been made that is not misleading or such as to cause reasonable doubt as to the identity of a party to the proceedings. And the further test as to " injustice or hardship which may be caused to any of the parties including those proposed to be added " has been considered by me already in respect of Mr Tripathi . And I come to the same conclusion in respect of Mr Hall and for the same reasons. I acknowledge the Claimant's obvious wish to have both Mr Hall and Mr Tripathi added as parties to widen the net of her claim and the possibility that she may otherwise be left with limited recourse dependent on the outcome of the full tribunal hearing . But that is the case with many discrimination claims . And if Mr Hall and Mr Tripathi are added as respondents, they will experience hardship and injustice, in having to give evidence on their own behalf and being potentially individually liable as respondents.
19. I had already considered the *Selkent Bus Company Ltd v Moore [1996] IRLR 661* decision (as stated in my earlier judgement) as part of my balancing exercise of all the relevant circumstances when considering the original application to amend. In particular I found then and find now that the amendments sought are substantial and there is no explanation as to why the amendment to include Mr Hall as a respondent was not made on September 11 other than, perhaps , the Claimant's representative had not had the time to prepare for the hearing which (if that excuse is given) is an inadequate reason. I also observe the Claimant had been receiving at least some legal advice from June 2020 and so the suggestion she could not be expected to properly advance all her claims on 11 September is without merit.
20. In my original judgment I did consider whether I could determine the issue of joining in Mr Tripathi whilst leaving the issue of the Claimant's claim against the First Respondent to a separate hearing. And determined that whether the Claimant is an employee of the First or Second Respondent it was not reasonable for her to join Mr Tripathi as a party. That decision is confirmed and for the reasons given above

and the further applications to amend the claim now to include Mr Tripathi and Mr Hall are refused.

EMPLOYMENT JUDGE

16 November 2020

Order sent to the parties on

23/11/2020

Office of the Tribunals