EMPLOYMENT TRIBUNALS

Claimant: Mrs S Kaur

Respondent: Greenhalgh's Craft Bakery Limited

Heard at: Manchester **On:** 30 November 2018

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Ms L Quigley, Counsel

JUDGMENT

1. The claimant has permission to amend her claim so as to introduce the allegations which appear in Annex B to the Case Management Order of 28 September 2018 ("the September CMO") as paragraphs 1(d) and 1(e). The claimant also has permission to pursue those in the alternative as allegations of direct sex discrimination.

2. By consent the claimant has permission to amend her claim so as to introduce a complaint of unlawful deductions from pay.

3. The claimant is refused permission to amend so as to rely on the second part of paragraph 1(a), 1(b) and 5 of Annex B to the September CMO.

4. The applications by the respondent for an order striking out parts of the claim or in the alternative for a deposit to be paid are refused, save in relation to the complaint of automatically unfair dismissal contrary to section 103A Employment Rights Act 1996, which is struck out because it has no reasonable prospect of success.

5. The allegations in Annex B to the September CMO which can proceed are therefore as follows:

- Paragraph 1(a) – first part only.
- Paragraph 1(c).
- Paragraph 1(d).
- Paragraph 1(e).
- Paragraph 3 insofar as it is an alternative to harassment in relation to such matters.
- Paragraph 6.
- Paragraph 8 insofar as it is an alternative to harassment in relation to paragraph 6.
- A complaint of unlawful deductions from pay which is addressed in the Case Management order which accompanies this Judgment.

REASONS

Introduction

1. This was a preliminary hearing convened following the September CMO in order to determine two broad matters.

2. The first was whether the claimant should be granted permission to amend so as to introduce complaints made in her further particulars of 8 August 2018 which were not contained in the original claim form.

3. The second was whether any of the complaints which were already part of the claim, or permitted by way of amendment, should be struck out because they have no reasonable prospect of success, or in the alternative the subject of a requirement to pay a deposit because they have little reasonable prospect of success.

4. Although those two broad areas were conceptually different, there was a degree of overlap because the merits of a proposed new complaint can be relevant to whether the claimant is permitted or refused.

5. Accordingly I dealt with matters in the following way. I read a written submission and heard an oral submission from Ms Quigley on behalf of the respondent on the amendment applications and then the merits issues, and then I heard from the claimant orally in response. In the course of submissions I viewed CCTV footage of certain incidents, and I was also referred to some documents which were in the bundle of documents (approximately 340 pages) which was provided for the purposes of this hearing. Any reference to page numbers in these reasons is a reference to that bundle.

6. It must be emphasised that I made no findings of fact in the course of this exercise.

7. Before addressing each allegation I will summarise the legal framework which applies to applications to amend and to applications to strike out or for a deposit order.

Relevant Legal Framework - Amendments

8. It is inherent within the general case management power in rule 29 of the Employment Tribunal Rules of Procedure 2013 that the Tribunal has power to refuse to allow a party to amend a claim which has been lodged. Conversely the Tribunal has power to allow such an amendment. In common with all such powers under the rules, the Tribunal must have in mind the overriding objective in rule 2, which is to deal with the case fairly and justly. That includes, so far as practicable, ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and important of the issues, avoiding delays, so far as compatible with proper consideration of the issues, and saving expense.

9. The leading case on how this discretion should be exercised remains **Selkent Bus Co Limited v Moore [1996] ICR 836**, in which the then President of the Employment Appeal Tribunal, Mr Justice Mummery, gave guidance on how Tribunals should approach applications for permission to amend. At page 843 at F, the EAT said:

> **"Whenever the discretion to grant an amendment is invoked, the Tribunal should take account of all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."**

10. The EAT went on to identify some circumstances which would certainly be relevant, although such a list could not be exhaustive. It will be important to identify the nature of the amendment, distinguishing between minor amendments such as the addition of factual details to existing allegations, or major amendments such as the making of entirely new factual allegations which change the basis of the existing claim. A substantial alteration which pleads a new cause of action may have to be treated differently from a minor amendment.

11. It is also essential for the Tribunal to consider whether a new complaint would be out of time as at the date of the application to amend. Consideration of time limits must encompass the applicable statutory provision for extensions.

12. The timing and manner of the application is also relevant. An application should not be refused solely because there has been a delay in making it, but delay is relevant to the exercise of discretion. It is relevant to consider why the application was not made any earlier.

13. The EAT in **Selkent** concluded that passage with the following:

> **"Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."**

Relevant Legal Principles – Striking Out/Deposit

14. The power to strike out arises under what is now rule 37 of the Employment Tribunals Rules of Procedure 2013. Rule 37 so far as material provides as follows:

> **"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –**
>
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success…"**

15. As far as "no reasonable prospect of success" is concerned, a helpful summary of the proper legal approach to an application to strike-out is found in paragraph 30 of **Tayside Public Transport Co Ltd v Reilly** [2012] CSIH 46, a decision of the Inner House of the Court of Session:

> **"Counsel are agreed that the power conferred by Rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (*Balls* v *Downham Market High School and College* [2011] IRLR 217, at para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (*ED & F Mann Liquid Products Ltd* v *Patel* [2003] CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED & F Mann Liquid Products Ltd* v *Patel*, supra; *Ezsias* v *North Glamorgan NHS Trust* [[2007] ICR 1126]). But in the normal case where there is a "crucial core of disputed facts," it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out (*Ezsias* v *North Glamorgan NHS Trust*, supra, Maurice Kay LJ, at para 29)."**

16. There is no blanket ban against there being a strike-out, for instance in particular classes of cases such as discrimination, although in **Lockey v East North East Homes Leeds** UKEAT/0511/10/DM, a decision of 14 June 2011 before HHJ Richardson sitting alone, the EAT said at paragraph 19:

> **"…In cases of discrimination and whistleblowing there is a particular public interest in examining claims on their merits which should cause a Tribunal to consider with special care whether a claim is truly one where there are no reasonable prospects of success: see *Ezsias* at paragraph 32, applying *Anyanwu v South Bank Student's Union* [2001] IRLR 305. …..The Tribunal is in no position to conduct a mini-trial; issues which depend on disputed facts will not be capable of resolution unless it is clear that there is no real substance in factual assertions made, as it may be if they are contradicted by contemporaneous documents."**

17. In **Ahir v British Airways plc [2017] EWCA Civ 1392,** Underhill LJ put it as follows (paragraph 16):

> **"Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and**

> **specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'."**

18. As for a deposit order, rule 39(1) permits the Tribunal to require a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance an allegation or argument in proceedings before the Tribunal where it considers that any such allegation or argument has little reasonable prospect of success.

Conclusions on Annex B Allegations

19. In this section of the Reasons I will address each of the allegations in Annex B in turn and explain my decision.

Harassment related to sex

20. Paragraph 1 of Annex B contained five allegations of harassment related to sex.

21. **Paragraph 1(a)** contained two matters relating to Michael Smart. The first was an allegation that he spoke openly about sexual matters in the presence of the claimant. Ms Quigley accepted that this was already part of the complaint and she did not pursue any application for this to be struck out or subject to a deposit. That matter will therefore proceed.

22. The second part of allegation 1(a) was that Mr Smart more or less every single day asked the claimant about how she was dressed. Ms Quigley opposed the application to introduce this made on 8 August 2018, even though that application was within the three month limitation period if it was established that those kind of comments happened right up until the claimant left employment in late June 2018. This allegation had not been mentioned in the claimant's written grievance about Michael Smart (pages 149-150) and nor had it been mentioned in her grievance meetings on 29 May and 6 June. It was not mentioned in her appeal. It formed no part of her claim form. Even though within time, allowing the allegation to be introduced would prejudice the respondent because CCTV records could only be accessed for the previous 28 days. Had the allegation been made in the claim form at the end of June records from late May could immediately have been accessed and preserved, but all records had now been overwritten. Further, on the factory floor the claimant had to wear a uniform so a discussion about how she was dressed was likely to have occurred in a different area where staff got changed, The CCTV from that area had not been retrieved or considered in relation to any of the other allegations. Further, employees had left the business and because this had not been raised previously it had not been addressed in the internal investigation. She submitted that the respondent could not fairly defend its case on this allegation if it were permitted to be pursued.

23. The claimant said that she had mentioned harassment on her claim form. She had written everything she could in the internal procedures. She had told Emma Morris verbally on 29 May that Mr Smart had been behaving in a "very dirty way" and that was in part a reference to this matter.

24. I decided that the balance of prejudice favoured refusing permission to amend. Although this allegation had been raised within the primary time limit, that

was not conclusive in favour of the claimant. It introduced a new range of factual allegations about Mr Smart never previously raised. The delay in raising it had deprived the respondent of the opportunity to address it in its internal investigation, and to preserve CCTV footage (which had audio as well as visual images). Even taking into account that the claimant was representing herself, and was under stress when completing her internal complaints and her claim form, there was no good reason for this matter having been omitted from those earlier documents, and her failure to include it meant that the respondent was in a worse position than if it had known about this allegation before 8 August 2018. I therefore declined permission to introduce that matter by way of amendment.

25. **Paragraph 1(b)** was an allegation about Rami Mohammad talking about sexual matters in the presence of the claimant, and regularly touching the claimant on her hand or arm in the office or when he was giving her a lift to or from work in his car. That too was a matter never previously raised. The claimant had made a complaint about Mr Mohammad in her internal complaints, but not a complaint about behaviour of this kind. It had not been considered in the internal investigation and no CCTV which might have been relevant to this had been preserved.

26. For the same reasons I concluded that the balance or prejudice favoured refusing permission to amend. Although the claim form contained a broad allegation of sexual harassment, these were new factual matters against someone about whom this complaint had not previously been brought. The allegations about Rami Mohammad made in the internal complaints were about his treatment of the claimant following the incident with Eva Falusi (see below). The respondent had been deprived of the opportunity of gathering or preserving evidence about these matters. Had it known about them at the end of June when the claim form was lodged the CCTV evidence in particular could have been preserved. That opportunity had been lost because of the claimant's delay in raising this until 8 August 2018. In those circumstances the balance of prejudice favoured refusing permission to amend.

27. **Paragraph 1(c)** was already part of the case. Permission to amend was not required. However, Ms Quigley submitted that it was an allegation with no reasonable prospect of success. This related in particular to the allegation that Ms Falusi that made sexual gestures towards the claimant. CCTV footage of that incident was available. I viewed the CCTV footage during the respondent's submission, and again during the claimant's submission, and having seen it I am satisfied that this allegation has a reasonable prospect of success. In addition, page 159 in the bundle was a witness statement from a member of staff who confirmed having seen Ms Falusi make a sexual gesture. It is up to the Tribunal that hears the case to decide whether the evidence proves the claimant's allegation or not. I rejected the application for that part of the allegation to be struck out or subject to a requirement to pay a deposit.

28. **Paragraph 1(d)** was that David Leigh had swiped a piece of blue cling wrap towards the claimant's back, having previously asked her to sit in his lap. The core of the allegation was the movement with the cling wrap. This was a new matter for which permission to amend was required. Ms Quigley accepted it was within the application to amend made on 8 August 2018 and was within the primary time limit, but said that the application lacked any merit. Alternatively, if permission to amend were granted, the allegation should be struck out as having no reasonable prospect

of success. She based this on the CCTV footage which I viewed. It showed Mr Leigh waving a strip of cling film towards the claimant's back. The matter had been reported at the time but the police dismissed it. Ms Quigley submitted that there was no evidence to suggest this was related to sex or was of a sexual nature. A statement from Emma Morris at page 160 in the bundle confirmed that the policers who attended told her that the claimant had initially reported that a male member of staff had "pinched her bum". Ms Quigley submitted this went towards the credibility of the claimant and therefore meant this was a weak allegation which should not be permitted by way of amendment.

29. It seemed to me that permission to amend should be granted and that this allegation should be neither struck out nor subject to a requirement to pay a deposit. The CCTV confirmed some conduct on the part of Mr Leigh towards the claimant. Whether the claimant can establish that it was related to sex will depend upon the oral evidence about previous exchanges between them. The application to amend was made within the primary time limit. It was essentially further particulars of the allegation of sexual harassment made on the claim form. The points made by the respondent about the lack of merit in the allegation could be pursued at the final hearing, and any alleged inconsistencies in how the matter had been reported could be canvassed in cross examination. I granted permission for the claim form to be amended to include this allegation, and declined to strike it out or order a deposit.

30. **Paragraph 1(e)** was about an incident on 15 June 2018 when Martin Almond asked the claimant why she was causing so many problems and said that she was "doing sex perception" to a colleague, Daniel, and threatened to tell her husband about it. This was a new matter for which permission to amend would be required. However, it had been mentioned internally in the grounds of appeal (page 228). The application to amend was made within the primary time limit. Ms Quigley's objection was primarily based upon the merits: that it could not possibly be related to sex or direct discrimination under section 13. I rejected that argument. It seemed to me reasonably arguable on behalf of the claimant that if she establishes the factual basis of the conversation, the Tribunal could conclude that it was "related to sex" because it arose out of a view by Mr Almond that the claimant was behaving inappropriately in her discussions with a male colleague. That could be because he perceived those discussions to be of a sexual nature, or it could be because he was influenced in his negative view by the fact the claimant was a woman. I therefore granted permission for the claimant to rely on this matter and I rejected the application for it to be struck out or for a deposit to be ordered.

Direct Sex Discrimination

31. The direct sex discrimination complaint set out in **paragraphs 3 and 4** of Annex B was really an alternative to the harassment complaint. Conduct which amounts to harassment cannot also be a detriment by way of sex discrimination, but if for any reason it does not amount to harassment it is possible for it to amount to sex discrimination. It seemed to me arguable that the matters which can proceed as allegations of sexual harassment could also be framed as sex discrimination in the alternative, and therefore I declined to strike any of these out or require the claimant to pay a deposit.

Harassment related to race or religious belief

32. **Paragraph 5** of Annex B was a new matter making allegations of race or religious belief harassment against Mr Mohammad in three respects:

(a) Threatening the claimant with being sacked if she was late or did not work properly, that happening many times every single day;

(b) Treating the claimant badly after she complained about Eva Falusi following the incident between the two of them; and

(c) Refusing to allow the claimant to take a day off when she requested one for medical reasons.

33. Ms Quigley accepted that the application to amend was made within time in relation to (a) if it continued up until the end of employment (although that was unclear), and in relation to (b). The date of the allegation in (c) was unclear. More importantly, she submitted, this was an entirely new allegation which had never featured before in any of the internal complaints or in the claim form. Complaints had been made about Mr Mohammad internally but they were not complaints of race or religious discrimination. In any event, the thrust of those earlier complaints was that Mr Mohammad had turned against her because of the incident with Eva Falusi. If that was correct that would not amount to race or religious discrimination.

34. In the course of her response on this point the claimant confirmed that she is not in fact a Muslim, as had been understood at the last hearing, but of the Sikh religion. She asserted her belief that Mr Mohammad was treating her badly in part because of that difference in religion. However, she did not adequately explain why her complaints about him during employment were confined to complaints that he treated her badly because of her complaint about Ms Falusi. In the course of her response she also made reference to a covert recording which was made of her meeting with Emma Morris, and she said in the course of that Ms Morris made some admissions about how Mr Mohammad treated women. That did not seem to me to be at all relevant to the merits of the complaint of race or religious discrimination.

35. Putting these matters together I decided to refuse permission to amend. The case that there was race or religious discrimination was directly contrary to the case which the claimant put forward at the relevant time where she identified a reason for Mr Mohammad to treat her badly which had nothing to do with race or religion. It was that she had brought a complaint about Ms Falusi. The balance of prejudice therefore favoured refusing permission since the claimant was not prejudiced by not being able to pursue a complaint which was directly contrary to what she had asserted at the time. In contrast the respondent would be significantly prejudiced if it had to investigate these matters and adduce evidence to rebut the substantive basis of these proposed complaints. I refused permission for this amendment.

36. **Paragraph 6** was an allegation about Michael Smart using the phrase “Paki shop” on one occasion in front of the claimant. Permission to amend was not required. Ms Quigley submitted that this allegation lacked merit. The claimant was not Pakistani. The comment could not be related to the claimant's race. I rejected this argument. The comment in question, if it is established that it was made, is

plainly related to race. The protected characteristic under section 26 does not have to be a protected characteristic possessed by the claimant. Further, it can create the proscribed environment even if not directed at the claimant personally. It seemed to me this allegation would turn on the facts and therefore should not be the subject of a strike out or deposit.

Direct discrimination because of race/religious belief

37. This complaint was an alternative to the harassment allegations. Insofar as it was an alternative to allegation 5, permission to amend was refused for the same reasons. Insofar as it was an alternative to allegation 6, permission to amend was granted because it was a mere re-labelling exercise. For the reasons set out above that allegation had a reasonable prospect of success.

Unfair dismissal complaint

38. No permission to amend was required as the whistle-blowing complaint had been raised on the claim form, but Ms Quigley submitted that it lacked merit. She based this on two propositions. The first was that the claimant had failed factually to provide sufficient information about her alleged protected disclosures to mean that the case had any reasonable prospect of success. That was based upon an analysis of the list of protected disclosures provided by the claimant on pages 65 and 66 in her further particulars of 8 August 2018, and on the information she provided in a 23 page response to the amended response form provided shortly before this hearing.

39. The second proposition was that the claimant had no prospect at all of showing any causal link between any such protected disclosures and her dismissal. The dismissing managers, Ms Morris and Ms Ogden, did not know of any protected disclosures about health and safety matters on the factory floor, and they had ample evidence to justify their decision given the 15 written complaints about the claimant which had been received, and given that even on the claimant's own case she was experiencing working relationship difficulties with a number of colleagues.

40. On the first point it seemed to me the claimant did have reasonable prospects of showing that she had provided information to her employer which could form the basis of a protected disclosure. Although she had not provided details of dates and people to whom she spoke on each occasion, it seemed to me reasonable to suppose that she would be able to do so in a way which would establish that she made at least one protected disclosure.

41. However, I agreed that her case was hopeless on causation. There was ample reason for an employee in her probationary period to be dismissed given the numerous written complaints about her that were received, and although I asked her a number of times the claimant could identify no evidence suggesting that Ms Morris or Ms Ogden were aware of the health and safety concerns she raised on which she relied as protected disclosures. The decision of the Court of Appeal in **Royal Mail Ltd v Jhuti [2017] EWCA Civ 1632** considered the different scenarios which might arise where an allegation is made that information before the decision maker has been manipulated by someone else who is aware of the protected disclosure. The allegations made by the claimant in this case fell within paragraph 60 of **Jhuti**, and

therefore it was the mental processes of Ms Morris and Ms Ogden alone which fell for consideration. The claimant had no evidence that they were even aware of those matters, let alone that that was the reason or principal reason for their decision. Further, there was a perfectly plausible reason given in the dismissal letter of 27 June 2018 (pages 223-224) and the analysis contained in the preceding note at pages 220-222 supported that view. It followed that the assertion made by the claimant about the reason for dismissal was contradicted by the contemporaneous documents.

42. Despite the public interest in complaints of whistle-blowing automatic unfair dismissal proceeding to a hearing, it seemed to me this is one of those cases where the claimant's case was hopeless. She had no facts available to her which would support the case on causation. I therefore struck out the automatic unfair dismissal complaint.

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Employment Judge Franey

3 December 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

14 December 2018

FOR THE TRIBUNAL OFFICE