



EMPLOYMENT TRIBUNALS

Claimant: Mrs O Swieca
Respondent: UPE Engineering Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Watford **On:** 29 May 2019
Before: Employment Judge Smail (sitting alone)

Appearances

For the claimant: Mr P Swieca
For the respondent: Ms P Hall

JUDGMENT

1. The claimant's application to amend the claim to add claims of discrimination is refused.

REASONS

1. This claim had been consolidated with a series of claims the claimant brings against Unique Employment Services Limited. The claimant is arguing that she was employed by Unique Employment Services Limited but in respect of UPE Engineering Limited she claims she was both an agency worker and a contract worker under the Equality Act 2010. I have today de-consolidated the claims, the claim against UPE Engineering Limited will proceed separately from the case against Unique Employment Services Limited.
2. A claim was issued on 7 November 2017 against UPE Precision Engineering claiming compensation for failure to provide terms and conditions of work under the Agency Workers Regulations 2010. A case management hearing came before me on 19 April 2018. The claimant had been engaged by UPE between 3 May 2017 and 20 July 2017. It is accepted that her engagement came to an end on 20 July 2017. At the preliminary hearing on 19 April 2018, further to an email that arrived at the tribunal earlier that day, the claimant intimated a desire to add a claim of discrimination. The essence of the claim was that she had

been terminated on 20 July 2017 because she was pregnant. I did not deal with the application that day, it was envisaged that there would be a hearing on 13 July 2018 to determine the agency workers claim together with her application to amend. Because this claim became consolidated with a series of claims against Unique Employment Services Limited that did not happen.

3. Today I have been tasked with sorting out the seven claim forms that the claimant has brought. On 19 April 2018 I ordered that a witness statement be prepared on the claimant's behalf in order to support her application to amend. It was clearly being made out of time and an extension of time would in effect be required. I also made it clear to the claimant's husband, who in effect runs these claims, that he could if he so wished to take the alternative route of issuing fresh claims. He has issued fresh claims in respect of Unique Employment Services Limited, the recruitment agency he says employed the claimant directly but in respect of UPE Engineering Limited he has persisted with his intention to amend the claims.
4. A variety of versions of the desired amendment have been produced, he has wanted to make complaint about the fact that the claimant had to lift boxes of 25kg maximum while still employed; that there was a failure to perform a maternity related risk assessment and that pregnancy was the true reason for dismissal because the day before the termination the claimant showed the respondent's managers Dean Lloyd and Sue Ephgrave a hospital note. On 17 July 2017 she had been taken to hospital owing to a significant amount of bleeding from the birth canal; the claimant had to spend two days in hospital.
5. All of those matters it seems to me were known by the claimant at the time she brought the original claim which focussed solely on a matter of agency workers' rights. In argument today and by reference to an extensive skeleton argument prepared for today the claimant by her husband has made several references to having suffered sexual harassment by Dean Lloyd. There is no adequate or satisfactory particularisation of those allegations, they have been made in very general terms orally today and in the skeleton argument prepared for today. Again, if the claimant had been subject to sexual harassment that would have been known by her at the time of her termination on 20 July 2017.
6. The explanation for seeking the late amendment is that on 20 February 2018 the claimant along with her husband met a former colleague with whom the claimant used to work at UPE Engineering Limited. The colleague stated that UPE had employed a male called Simon for the same position as the claimant and the recruitment had been done within about a month of the claimant's termination. The ostensible reason for terminating the engagement had been to cut costs. So submits the claimant's husband, the claimant had reason to believe on the 20 February 2018 that cost was not the true reason for the termination of the engagement rather it must be something else. That something else being the fact that she was pregnant.
7. In the later part of February 2018 the claimant did write letters to the respondent asking what the reason was for the termination of the engagement. He says that

he did not get any answer to those letters and therefore on 19 April 2018 intimated a desire to amend the claim.

8. If the amendment were granted there is no doubt that it would change significantly the character of this case. A discrete matter on the rights of agency workers to terms and conditions would transform into a significant claim in terms of time and compensation sought for a variety of allegations of discrimination relating to pregnancy, maternity and sex. These are new causes of action, not relabelling.
9. The first difficulty it seems to me with the application is that the extent of the subject matter that the claimant wishes to bring before the tribunal includes extensive matters that she knew about on the 20 July 2017. There is no suggestion that she did not know of her rights to bring claims to the employment tribunal, on the contrary she brought a claim for agency workers' rights.
10. I also reject the suggestion that the claimant learned information in February 2018 which necessarily pointed to the fact that her termination was not for the reasons suggested. First of all, there was a gap between her termination and the recruitment of "Simon". The claimant's husband, who prepared a witness statement in support of this application was cross examined by Mrs Hall. He was asked to identify the friend who had passed on this information on 20 February 2018. He was unable to name that person. He claimed he did not know the name. He was relying therefore on un-attributable hearsay material.
11. Mrs Ephgrave has served a statement on this matter on behalf of the Respondent. She is its Financial Director. At paragraph 5 she says:

"Mrs Swieca alleges that she was directly replaced by a worker called Simon. That must refer to Simon Byass. He started with UPE on 11 September 2017. He was employed directly by UPE under a contract of employment. He was never engaged through UES or any other agency although he does undertake some of the work that was previously done by Mrs Swieca. He has a wider range of duties and was not a direct replacement for her role."
12. Accordingly, Mr Byass was appointed one month and three weeks after the claimant's termination. He was not an agency worker; it seems he was directly employed. It is not obvious then that the claimant will establish a factual scenario whereby there will be a prima facie case that she was replaced by reason of her pregnancy. A gap of seven weeks between engagements could be for a variety of matters.
13. As stated, the claimant seeks to place reliance on the behaviour of Dean Lloyd. It has been put in forcible terms orally today that Mr Lloyd harassed the claimant even though there are no adequate particulars of that in any document. I am told and I accept that Mr Lloyd left the employment of the respondent over a year ago. There would be evidential prejudice to the respondent were I to allow this amendment. If she was harassed by Mr Lloyd, she knew that in July 2017.
14. If the claimant suspected that she was dismissed because of pregnancy she had material to that effect on 20 July 2017. She had shown the respondent a hospital

note the day before. If there was likely to have been a real connection there was material there. It seems to me the conversation relied upon on 20 February 2018 is not sufficiently cogent strongly to point to a prima facie case that this termination and the subsequent hiring of Mr Byass was connected with pregnancy. There was also a considerable delay between the 20 February 2018 and 19 April 2018 when the application was intimated.

15. I have considered whether to limit permission to amend to the argument that the termination was in connection with the pregnancy. That would avoid difficulties in claiming harassment against Mr Lloyd, difficulties in raising matters of health and safety in terms of the weights carried by a pregnant woman and all those matters that would have been known about on 20 July 2017. However, it is my conclusion that there is insufficient cogency in the evidence relating to the unattributable comments said to be made on 20 February 2018. It does not amount to as it were a smoking gun strongly pointing to a discriminatory decision.
16. In my judgment there is not a good explanation for the delay of 9 months in making this claim, as I say there was plenty of material the claimant could have relied upon if she actually believed she was the subject of pregnancy discrimination. There was in any event too long a delay between 20 February 2018 and 19 April 2018 when the amendment was first intimated. In terms of limitation period it would not in my judgment be just and equitable to extend time for these reasons.
17. The primary period of limitation is 3 months, expiring on 19 October 2017 from the date of termination of the engagement. Under the Selkent principles [1996] ICR 836, EAT, I have to take into account the fact that these claims are new claims in substance and that they are brought out-of-time. I take into account whether it would be just and equitable to extend time. There is no good explanation for the further 6 months delay in respect of those matters known about in July 2017. The unattributable comments said to be discovered in February 2018 relating to a 7 week gap in the recruitment of Mr Byass do not generate a strong inference of discrimination and do not explain the further 2 month delay between February and April 2018. The balance of hardship falls in favour of the respondent in my judgment because of the genuine evidential prejudice involved in one of the key managers no longer working for the respondent.
18. In all the circumstances the application to amend fails.

Employment Judge Smail

Date: ...3 September 2019.....

Sent to the parties on:

.....
For the Tribunal Office