EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Charlotte Crawford	V	**Image IT Ltd t/a Granger Hill**

PRELIMINARY HEARING BY TELEPHONE

Heard at: **Watford** **On: 19 October 2020**

Before: **Employment Judge Bedeau**

Appearances:
For the Claimant: **Mr S Liberadski, Counsel**
For the Respondents: **Mr E Aston, Solicitor**

RESERVED JUDGMENT

The claimant's application to amend her claims is granted.

REASONS

1. By a claim form presented to the tribunal on 23 August 2019, the claimant made claims of automatic unfair dismissal; dismissal contrary to section 98(4) Employment Rights Act 1996; and direct sex and pregnancy discrimination, section 18 Equality Act 2010. She states that she was employed by the first respondent as a Graphic Designer, from 1 September 2012 to 1 April 2019.
2. In the response presented to the tribunal on 10 October 2019, the respondents contend that the claimant was not an employee as she had been engaged in work as a casual worker following her signing a Casual Workers' Agreement. Work was provided on an ad-hoc basis. All claims are denied.
3. At the preliminary hearing held on 11 May 2020, before Employment Judge Warren, the case was listed for a final hearing over four days from 24 to 27 May 2021. It was also listed on 14 December 2020, before an Employment Judge to hear and determine the issue of the claimant's employment status.

4. The claimant's representative, Ms V Thakerar, solicitor, at the preliminary hearing, submitted that the claimant's case includes unfavourably treatment as she was allocated less and lower quality work, and was asked to reduce her hourly rate because she had taken maternity leave.

5. Mr Aston, solicitor for the respondent, submitted that the claimant's only claims are automatic unfair dismissal and direct pregnancy and maternity discrimination because she had taken maternity leave. As such, the case turns on whether or not she was an employee.

6. Although EJ Warren agreed with Mr Aston in relation to how the legal claims have been put, the Judge was, however, of the view that the matters referred to by Ms Thakerar, appeared to be in the pleadings.

7. The Judge listed this hearing to determine the claimant's application to amend should she make one; to identify the issues; to consider whether an open preliminary hearing satisfies the overriding objective; and to make such further case management orders as may be appropriate.

The background

8. In giving the background to this case I am not making any findings of fact as did not hear any evidence from the parties.

9. In a claim form presented to the tribunal on 23 August 2019 which has the claimant's solicitors as being her representatives, she made claims of pregnancy and maternity discrimination. In her Statement of Case, she asserts that she was employed by the first respondent on 1 September 2012, as a Graphic Designer and was dismissed on 1 April 2019. She states that on 9 March 2018, she informed Mr Grainger Hill, the second respondent, that she was pregnant. After disclosing her pregnancy, Mr Hill, on 29 March 2018, advertised for a Graphic Designer/Artworker/Mac Operator. On 17 April 2018, a new person was employed, Ms Molly Vincent, who was contracted on a part-time casual worker basis to provide maternity cover during the claimant's absence.

10. The claimant had been working up to 26 June 2018 and gave birth on 27 June 2018. Thereafter she was on maternity leave.

11. At a meeting with Mr Hill on 1 February 2019, the claimant informed him that she would be available for work from mid to late February 2019, working Mondays, Wednesdays, and Fridays from 1:30pm to 5:30pm. Following the meeting, the claimant's casual worker contract was revised to incorporate her new hours of work. Mr Hill advised her to delay her return to work to April 2019, as she would lose out on maternity pay should she return earlier. He informed her that her maternity pay was due to come to an end in April.

12. On 29 March 2019, Mr Hill texted the claimant informing her that a client of the first respondent was looking for someone to carry out freelance work and would be content if she contacted the client directly. However, based on her previous experience, she did not follow this up.

13. On 3 May 2019, while visiting a work colleague at the first respondent's premises, she witnessed Ms Vincent who was working at her desk. On 13 May 2019, she emailed Mr Hill expressing her concern that she had not been offered work since April 2019 when she was due to return to work and had not been given a start date.

14. In Mr Hill's email to her dated 17 May 2019, he wrote that the work she had been doing, was diminishing and there was a consequent reduced need for her services. Ms Vincent, he wrote, was more proficient in the skills necessary to carry out the kinds of work the first respondent had a current demand for and was cheaper to employ. He did not have any work to offer the claimant.

15. As the claimant believed that Ms Vincent was carrying out work she had been doing, she was of the view that there had not been any diminution in her work and that she was replaced by Ms Vincent because she was on maternity leave and had, effectively, been dismissed.

16. On 22 May 2019, Mr Hill emailed the claimant chasing up a response to his previous emails. He asked her to reconfirm the days and hours she would be available for work, and whether there was any movement in her hourly rate.

17. In the claimant's reply, dated 23rd may 2019, she stated that she was saddened that Mr Hill felt no obligation to continue with her employment following her maternity leave, and would like to appeal his decision as she was "suffering a disadvantage due to unfavourable treatment". She refused to reduce her hourly rate of £18 which have been agreed since 2015. She stated that she had seven years' experience working for the respondents and found his suggestion insulting. She hoped for a resolution to enable her to return to her usual role.

18. In Mr Hill's email reply dated 31 May 2019, he stated that the claimant was not employed since 2012 as she resigned in 2015, and that on 1 January 2018, she signed a casual worker's contract which had not been terminated. She was not an employee but a casual worker. He denied he treated her unfairly and asked her to confirm her available days and hours.

19. On 3 July 2019, Mr Hill informed the claimant of the possibility of working for a prospective client of the first respondent and that she should reconfirm the days and times she would be available for work. The claimant replied on 8 July 2019, confirming her days and times which Mr Hill had been aware of earlier in the year. Later, on 8 July, Mr Hill informed the claimant that he would revert to her after speaking to the prospective client.

20. On 9 July 2019, the claimant emailed Mr Hill stating that he should not speak to the prospective client as she would do so should she wish to engage in work for them.

21. It is the claimant's case that she was employed since 2012 and was dismissed by Mr Hill when he informed her that there was no work for her to do. Her position had been filled by Ms Vincent after Ms Vincent was sent on a website course to obtain the skills the claimant did not have. The only reason why the claimant was replaced by Ms Vincent was that she, the claimant, had been pregnant and was on maternity leave.

22. The claimant, therefore, claims against the first respondent, unfair dismissal as the reason for her dismissal does not fall within section 98(1) Employment Rights Act 1996, "ERA" and that it was contrary to section 98(4), ERA. She also claims pregnancy discrimination under the Equality Act 2010, "EqA", as she was treated less favourably because she was pregnant and was dismissed because she was pregnant and had taken maternity leave.

23. Her grounds of complaint are 10 pages and 41 paragraphs long.

24. In the response presented to the tribunal on 10 October 2019, the respondents averred that the claimant resigned with effect from November 2015. From October 2015 to 14 February 2018, she worked 3 to 4 hours a week on an ad-hoc basis. She could decline work and that the casual workers agreement clearly stated that it did not confer employment rights. These were all the indicators of self-employment. Some of the matters relied by the claimant may be out of time. They requested further information on the unfair dismissal claims.

25. The respondents then gave a different account of events from February 2019. In relation to Ms Vincent, her skills were different from the claimant's and were needed by them. She was, however, unable to provide consistent hours and signed a Casual Workers Agreement on 1 May 2019. In relation to the pregnancy and or maternity discrimination claims, they asked for further information.

26. I was told that a second Statement of Case served on 20 May 2020, was accompanied by an application to amend. As Mr Liberadski, counsel for the claimant, later became instructed, a final statement of case was prepared by him and served on or around 16 October 2020. It was produced with the intention of clarifying, legally, the claims.

27. In relation to the final Statement of Case, in paragraphs 11 reference to the claimant being an employee and worker is deleted to be replaced by the claimant was an employee within the meaning of section 230(1) ERA and section 83(2) EqA to include a worker.

28. Paragraph 37 is an additional paragraph in which the claimant states that she was automatically unfairly dismissed under regulation 20 Maternity and Parental Leave etc Regulations 1999, "MPLR". It states the following:-

> "Automatically Unfair Dismissal
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> 37. The claimant bring the claim for automatically unfair dismissal pursuant to regulation 20 of the Maternity and Parental Leave etc Regulations 1999. The claimant was dismissed (or if, which is not admitted, it is found that she was dismissed by reason of redundancy, she was selected for redundancy) because of reasons connected with her pregnancy, the fact that she had given birth, and/or the fact that she had taken, sought to take or avail herself of the benefits of maternity leave."

29. The amendment in paragraph 38 is to plead unfair dismissal under section 98(1) and 98(2) ERA, in the alternative.

30. Paragraph 39, in which the claimant was pursuing a claim for personal injury compensation, is deleted.

31. Paragraph 41 uses the correct terminology under section 18 EqA of unfavourable rather than less favourable treatment.

32. Paragraph 42 is an addition in which she claims direct sex discrimination and/or pregnancy under section 13 EqA.

33. Paragraph 43 is also an additional paragraph in which the claimant claims detriments and/or less favourable treatment, short of dismissal, under regulation 19 MPLR; unfavourable treatment contrary to section 18 EqA; and direct discrimination because of sex and/or pregnancy and maternity. The

detriments being the respondents' failure to offer her work on or after 1 April 2019, and the second respondent's request on 22 May 2019 to reduce her hourly rate.

34. In terms of remedy, the claimant claims declarations that she was unfairly dismissed and discriminated against, compensation for financial losses both past and future, as well as for injury to feelings.

Submissions

35. Mr Liberadski submitted that the Employment Judge at the earlier preliminary hearing, anticipated that there would be further information from the claimant clarifying her claims. The Judge was of the view that she had referred to a number of factual matters in her claim form but had only identified two claims. The purpose of the final statement of case is to clarify her claims. Section 83(2), Equality Act 2010, provides a broader definition of in employment to include a worker which the claimant is entitled to avail herself of. Paragraph 11 uses the correct terminology. There are no additional facts only what the claimant had put, in narrative form, in her claim form.

36. Paragraph 37 adds automatic unfair dismissal under regulation 20 based on the facts as pleaded.

37. In paragraph 41 the claimant asserts, and has been consistent, that her dismissal was because of her pregnancy and/or maternity. Paragraph 42 is the section 13 EqA claim.

38. Section 18 would include a broader definition of employee and includes a worker, who has the right to take maternity leave.

39. Regulation 19 as referred to in paragraph 43, allows the claimant to pursue a claim against the respondents short of dismissal. The respondents assert that she was never dismissed but the claimant was not offered work.

40. What the claimant has done, Mr Liberadski further submitted, is to apply new labels to facts already pleaded. She is entitled to invite the Tribunal to consider whether she was a worker should her claims of unfair dismissal and pregnancy and/or maternity dismissal fails on the basis that she was not an employee in the strictest sense..

41. Mr Aston, solicitor on behalf of the respondents, submitted that in the claimant's claim form she brought claims of unfair dismissal and under section 18 EqA. They were brought on the basis that she was asserting that she was an employee and not the worker and refer to her dismissal. He contends that she was not an employee and cannot bring a claim under section 18 as a worker. Her detriment claims are new. She sought to expand her claims and had three opportunities to do so.

42. The new claims raise new legal points over and above what the claimant had pleaded in her claim form. It was only after raising the issue of the consequences for her in maintaining her status as an employee, she then produced her final statement of case. He invited me to refuse the application to amend leaving only the unfair dismissal and section 18 claims based on her dismissal. If she fails to establish at the preliminary hearing on 14 December 2020 that she was an employee, her claims will fail. The respondent position all along was that she was a worker and not an employee.

43. Mr Aston further submitted while workers may be entitled to Statutory Maternity Pay, they are not entitled to Ordinary Maternity or Additional Maternity Leave which an employee is entitled under regulation 4 MPLR, and under regulation 2, an employee does not cover a worker.

44. Respondents will suffer injustice and hardship if the application is allowed as time would have to be spent on addressing the additional claims and how they have been put. This will incur the expense.

The law

45. A party can apply to amend a claim or response at any time in proceedings, Selkent Bus Co Ltd v Moore 1996 ICR 836 and rule 29, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

46. Whether an amendment is required will depend on whether the claim form or response provides, in sufficient detail, the complaint or defence the party seeks to make. The mere fact that a box is ticked indicating a specific claim such as direct race discrimination does not mean that it raises a complaint of indirect race discrimination and victimisation. In considering whether the claim form contains a particular complaint that the claimant is seeking to raise, it must be considered as a whole. The mere fact that a box is ticked indicating that a certain claim is being made may not be conclusive in determining whether it sets out the basis for such a complaint, Ali v Office of National Statistics 2005 IRLR 201, Court of Appeal.

47. Sir John Donnaldson, in Cocking v Sandhurst (Stationers) Ltd and Another, [1974] ICR 650, in the National Industrial Relations Court, gave guidance on what the Tribunal should have regard to when considering whether to allow an amendment. He stated that Tribunals must have regard to all the circumstances, in particular, any hardship which would result from either granting or refusing the amendment. This was approved in Selkent.

48. In Selkent, over twenty years later, Mr Justice Mummery, President, as he then was, held that in determining whether to grant the amendment application, the Tribunal must always carry out a balancing exercise of all relevant factors, having regard to the interests of justice and to the relative hardship caused to the parties if the application is either granted or refused. The relevant factors are: the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

49. Applications to amend range from: the correction clerical or typing errors; the addition of new factual details to existing allegations; the addition or substitution of other labels for facts already pleaded; or the making of entirely new factual allegations which changes the basis of the existing claim. Tribunals have to decide whether the amendment sought is one of a minor matter or a substantial alteration so much so that it pleads a new cause of action, Selkent.

50. In the case of New Star Asset Management Ltd v Evershed [2010] EWCA Civ 870, the Court of Appeal allowed the claimant to add public interest

disclosure to a constructive unfair dismissal claim as the amendment did not raise new factual allegations.

51. In Ahuja v Inghams [2002] ICR 1485, the CA held, Mummery LJ, that Employment Tribunals have the power to allow an amendment even at a late stage based on the evidence given at the hearing. They have a wide jurisdiction to do justice in the case and "…should not be discouraged in appropriate cases from allowing applicants to amend their applications, if the evidence comes out somewhat differently from what was originally pleaded. If there is no injustice to the respondent in allowing such an amendment, then it would be appropriate for the Employment Tribunal to allow it rather than allow what might otherwise be a good claim to be defeated.", paragraph 43.

52. It may be appropriate to consider, as another factor, whether the claim, as amended, has any reasonable prospects of success, but the Tribunal should proceed with caution as evidence will be required in support of the amendment, Cooper v Chief Constable of West Yorkshire Police and Another UKEAT0035/06; and Woodhouse v Hampshire Hospitals NHS Trust EAT0132/12.

53. Whether the claim would be in time if the amendment is a new claim, is not determinative of the application to amend.

54. In the Presidential Guidance – General Case Management, issued on 22 January 2018, amending a claim or response, falls within rule 29 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the power of the Tribunal to issue case management orders. "In deciding whether the proposed amendment is within the scope of an existing claim or whether it constitutes an entirely new claim, the entirety of the claim form must be considered.", paragraph 7.

> "The fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment", sub-paragraph 11.1

Conclusion

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55. I am required to consider the claim form as a whole to determine whether it raises a claim or claims the claimant is seeking to make, Ali v ONS. In her claim form, in her first Statement of Case, she refers to having signed a Casual Workers' Agreement; that work was not offered to her since 1 April 2019; that she was asked to reduce her hourly rate; she decided whether to take on work with the respondent's prospective clients, which suggests she may be a worker or independent contractor; that Ms Vincent had taken over her role and had been given training to acquire new skills; and that she, the claimant, had been dismissed. She claims the discriminatory treatment including her dismissal occurred while she was pregnant and on maternity leave.

56. Having considered those factual assertions, I conclude that what the claimant is seeking to do in her final Statement of Case, is to put labels on facts already pleaded and has not made any new factual allegations or entirely new claims. She is entitled to argue that not only was she an employee, in "employment", but also a worker.

57. Her position was clarified by Mr Liberadski, once he became instructed.

58. I take into account the passage cited above in the case of Ahuja v Ingham. The factual allegations are pleaded and do support the basis upon which the claims are put.

59. In relation to the balance of prejudice, if the application is not granted, and the claimant loses at the preliminary hearing on 14 December 2020, on the issue of whether she was an employee, she will have no claims against the respondents. On the other hand, the respondents would have to orientate their case to take into account the new claims, which in my view, is likely to be based more on legal argument than on additional evidence. There are no new factual assertions. I was not persuaded that the prejudice to the respondents outweighs the prejudice the claimant.

60. I have not dealt with the merits of claims as they will be determined on the facts as found by the Tribunal. I am, therefore, unable to express a view on this issue and do follow the approach in the cases of Cooper v Chief Constable of West Yorkshire Police, and Woodhouse v Hampshire Hospitals NHS Trust.

61. Accordingly, and having regard to the above matters, I grant the claimant's application.

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Employment Judge Bedeau

14 November 2020

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Sent to the parties on:

.17 November 2020…….

For the Tribunal:

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