EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Sriramaiah**

Respondent: **Visa Embassy Ltd**

Heard at: **East London Hearing Centre (by CVP)**

On: **Thursday 26 September 2024**

Before: **Employment Judge S Shore**

Representation
For the claimant: Mr J Sheng, Counsel
For the respondent: Mr A Rhodes, Counsel

PUBLIC PRELIMINARY HEARING JUDGMENT

1. I made the following determinations:

    1.1. The claimant's claim of detriment because she made a protected disclosure was presented out of time. It was reasonably practicable for the claim to have been presented in time, so the Tribunal has no jurisdiction to hear the claim, which is struck out.

    1.2. The claimant's application to amend her claim to include claims of age discrimination is refused. The claimant's claim of age discrimination is dismissed.

REASONS

Background

1. The respondent is a company providing visa services. The claimant was employed by the respondent as an Immigration Sales Advisor. The claimant says that she was employed from 21 January 2020 to 10 October 2023 inclusive. The respondent says that the claimant was employed from 21 January 2020 to 1 September 2021 and from 6 March 2023 to 10 October 2023, and that

in the intervening 18 months she worked on an ad hoc basis from India for 14 months from September 2021 to November 2022.

2. The claimant presented a claim to the Tribunal on 10 January 2024. This followed a period of ACAS early conciliation from 10 November 2023 to 11 December 2023. The respondent defends the claim.

3. This public preliminary hearing was set up at a preliminary hearing before Employment Judge Gordon Walker on 13 June 2024 to determine whether to strike out the claimant's claim of detriment because she made a protected disclosure and/or age discrimination because the detriment claim was presented out of time or because the claimant had not particularised any age discrimination claim in her claim form or the attachment to it.

4. The hearing was also to determine any application made by the claimant to amend her claim and deal with any case management.

5. In preparation for the public preliminary hearing, I read the following documents:

   5.1. A witness statement from the claimant with documents attached;

   5.2. An agreed bundle of documents of 193 pages (if I refer to any documents from the bundle, I will note the relevant page numbers in square brackets); and

   5.3. The Tribunal's digital file.

6. The hearing was initially listed to discuss Judicial Mediation but that part of the hearing was removed from the list.

7. The hearing started at 10:00am. Mr Sheng appeared on a pro bono basis from the Advocate organisation. I indicated that I had read the claimant's statement and documents. Mr Rhodes was concerned that the claimant's set of documents may be different to those in the bundle. I sent him a copy of the claimant's document and gave him some time to consider the documents. Mr Rhodes was satisfied that there was nothing new in the documents. The claimant said she had produced the bundle because the copies of her documents were of poor quality in the bundle produced by the respondent.

8. Mr Rhodes confirmed that he was not intending to refer to any of the documents that had been produced by the claimant.

9. The claimant adopted her witness statement dated 24 July 2024 and gave evidence on affirmation. Mr Rhodes cross-examined the claimant. I asked the claimant a question. Mr Sheng asked a re-examination question.

10. We then took a break before Mr Rhodes and Mr Sheng made oral submissions. I considered my decision and delivered my judgment which struck out the claimant's claim of detriment because she made a protected disclosure as it was presented out of time and it was reasonably practicable for the claimant to have presented it in time.

11. Mr Sheng indicated that the claimant wished to make an oral application to amend her claim to include 13 allegations of age discrimination that were set out in her further information [17-22]. There was no written application to amend. Mr Rhodes did not object to the oral application and was happy to make oral submissions in response. I heard the application and response. I retired to consider my decision and returned at 2:30pm to deliver my decision, which was to refuse the claimant's application to amend to include the 13 allegations of age discrimination. This had the effect of dismissing the claimant's claim of age discrimination.

12. We then moved to case management matters, which are dealt with in a separate order.

Decisions

Protected Disclosure Detriment

13. Parliament has set down the time limits for bringing claims to the Employment Tribunal. It is for a claimant to show on the balance of probabilities that it was not reasonably practicable for her to present her claim to the Tribunal in time.

14. The relevant law is contained in section 48 of the Employment Rights Act 1996:

48 Complaints to employment tribunals.

… (1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B…

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

(4A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).

15. Mr Sheng asked me to note that the List of Issues that had been drafted at the previous hearing had not included all the detriments that the claimant alleged she was subjected to. As we were dealing with the question of jurisdiction, I had to clarify what the claims were before determining the time limit question. Mr Sheng said that there were three detriments to add to the three detriments set out in the draft List. The latest in time of the three is alleged to have happened on 2 February 2023, which is the same date as the last of the allegations in the original List.

16. The undisputed facts are:

    16.1. The claimant alleges that the last detriment to which she was subjected occurred on 2 February 2023;

    16.2. The claimant started early conciliation on 10 November 2023;

    16.3. The claimant obtained an early conciliation certificate dated 11 December 2023; and

    16.4. The claimant presented her ET1 on 10 January 2024.

17. The claimant's claim of whistleblowing detriment was, on the face of it, presented outside the time limit set out in section 48 of the Employment Rights Act 1996. The claimant cannot benefit from the extension of time for ACAS early conciliation.

18. The question of what is reasonably practical or means what was reasonably feasible (**Palmer & Another v Southend on Sea Borough Council** [1984] ICR 372). In the case of **Dedman v British Building and Engineering Appliances Limited** [1974] ICR 53, the Court of Appeal stated the relevant questions were –

    18.1. what were the claimant's opportunities for finding out [their] rights?

    18.2. did [they] take them, if not, why not?

    18.3. [were they] mislead or deceived?

19. The claimant submitted that at the time that the claims of whistleblowing arose, she was completely unaware of the Employment Tribunal and that she could bring a claim for detriment because of whistleblowing.

20. In the leading case of **Marks and Spencer plc v Williams-Ryan** [2005] EWCA Civ 470, it was described as the 'first principle' of analysis of the 'escape clause' that the question of what is reasonably practicable should be given 'a liberal interpretation in favour of the employee'. I applied that guidance. I also considered the overriding objective. The question of what is reasonably practicable was a question of fact for me to determine.

21. The claimant's first line of submission was her alleged ignorance of the Tribunal and the law. I appreciate that the claimant was resident in the United Kingdom on a student visa when she began work with the respondent and that English is not her first language. However, I also note that she is a graduate and had no problem understanding and answering Mr Rhodes' questions.

22. The claimant admitted researching the law on the furlough scheme in order to challenge the respondent. She also said she had researched the law relating to

visa schemes in order to challenge the respondent about the legality of its scheme. On both occasions, the person she challenged was Mr Singh.

23. The claimant accepted under cross-examination that she thought that what Mr Singh did after she had blown the whistle was wrong and unlawful. However, she said she took no steps to enquire about her rights until she spoke to her cousin, who is a lawyer qualified in India. She said he advised her that the limitation period was six years. I find it utterly incomprehensible that anyone would ask a lawyer who practised in one jurisdiction about the law in a different country. That is particularly true when there is so much information available on reliable websites such as Gov.uk and ACAS.

24. I take from the claimant's evidence the fact that she knew that a limitation period was in place, even if she had been given incorrect information about what it was. I also note she did nothing to confirm the accuracy of her cousin's erroneous advice.

25. The leading textbook on employment law: Harvey on Industrial Relations and Employment Law makes the following comment:

*"It was held by Brandon LJ in **Wall's Meat** that ignorance or mistake 'will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made […]'. One question to be asked in ignorance or mistake cases will therefore be whether the claimant who did not engage an advisor acted reasonably in failing to do so. Consideration will be both to the reasonableness of failing to instruct a solicitor, but also the reasonableness of failing to seek advice from other sources such as the Citizens Advice Bureaux, pro bono charities, ACAS or, increasingly, sources of information available on the Internet. On the latter point, the ease of accessing information on the Internet is a material development which makes it far harder for a litigant to claim ignorance is objectively reasonable. In **Cygnet Behavioural Health Ltd v Britton** [2022] IRLR 906 the EAT, Cavanagh J, held (at [56]) that it had been perverse to accept as reasonable the ignorance of a severely dyslexic claimant suffering from mental health issues given that his ability to function in other respects (continuing to work, submitting an appeal against dismissal and engaging with his regulator) showed no evidence of his being unable to 'type a short sentence into a search engine and to seek information about unfair dismissal time limits, or to ask an acquaintance by email to search for that information' adding (at [58]) that 'it would be the work of a moment to ask somebody about time limits or to ask a search engine'."*

26. I find that it was not reasonable for the claimant to have failed to make simple enquiries about the matters that she now complains about around the time that they allegedly occurred. Further, I find that the claimant's reliance on the advice of her cousin was foolhardy.

27. The claimant's second line of submission was that she was too unwell to make the application to the Tribunal in time. I reject this line of argument because the claimant produced no evidence whatsoever to me that showed she had been ill at all, never mind too ill to submit her claim. It damaged the claimant's credibility that she claimed to have PTSD in her ET1 but admitted to Mr Rhodes in cross-examination that she had never seen her GP about any mental health matter.

28. The claimant also raised her father's illness as a reason why she had not submitted her whistleblowing claim in time. She produced no medical evidence about his illness.

29. The claimant did not even state when she and her father had been ill during the whole of the period when it may have been reasonably practicable to present a claim in time.

30. The claimant cited fear of retaliation by Mr Singh as a reason why she had delayed submitting her ET1. I reject her submission, as she had complained about the legality of the respondent's furlough policy and its visa scheme. I do not accept that the claimant had a genuine fear of Mr Singh's reaction to her starting a claim. She said she feared that he would tell her family that she had married someone from the Muslim faith. She is from the Hindu faith. However, the claimant explained that when she eventually decided to act in relation to her claim, she told her mother she had married someone from the Muslim faith and that made everything alright with her family.

31. I do not accept that the claimant could not make a claim whilst still employed because she needed the money she was earning. The law protects employees who blow the whistle and any rudimentary internet search or conversation with ACAS would have confirmed this to the claimant.

32. The claimant relied on the incorrect advice she received from the lawyer in India. This line of defence is unsustainable because of the principle in **Dedman** that where a time limit is missed because of the advice of a lawyer, the claimant's remedy is against the lawyer.

33. I find that the claimant finally contacted ACAS around 8 November 2023. However, she seemed to blame ACAS for not advising her that her claim for whistleblowing was already out of time. I find that the claimant is at fault for failing to explain her case and ask questions about time limits.

34. I find that it was reasonably practicable to have submitted the whistleblowing case in time. If I had found that it was not reasonably practicable, I would have found that the claimant did not submit the claim within a further reasonable period.

Amendment

35. There is extensive jurisprudence on the question of amendments to Tribunal claims. The authorities regarding amendments are set out in several cases including **Cocking v Sandhurst** [1974] ICR 650, **British Newspaper Printing Corporation (North) Ltd v Kelly** [1989] IRLR 222, **Selkent Bus Co v Moore** [1996] IRLR 661, **Housing Corporation v Bryant** [1999] ICR 123, **Harvey v Port of Tilbury (London) Ltd** [1999] ICR 1030, **Ali v Office of National Statistics** [2005] IRLR 201, **Abercrombie v Aga Rangemaster plc** [2013] EWCA 1148. It was most recently considered by the EAT in **Vaughan v Modality Partnership** [2021] IRLR 97.

36. I also considered the EAT decision in **Baker v Commissioner of Police for the Metropolis** [2010] UKEAT/0201/09. In that case, it was decided there was no error of law in concluding that an employment tribunal claim form (ET1) did not

contain a complaint of disability discrimination where the box in relation to disability discrimination was ticked, but all the details in the form related to race discrimination.

37. Mr Justice Underhill considered the appropriate conditions for allowing an amendment in **Transport and General Workers Union v Safeway Stores Ltd** UKEAT/009/07. In particular, he referred to the guidance of Mr Justice Mummery in **Selkent Bus Company Ltd v Moore** [1996] IRLR 661 where he set out some guidance. That guidance included the following points:

> (4) *Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*
>
> *(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*
>
> > *(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels of facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of a minor matter or is a substantial alteration pleading a new cause of action.*
> >
> > (b) *The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether the complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal, Section 67 of the 1978 Act.*
> >
> > (c) *The timing and manner of the application. [An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made; for example, the discovery of new facts or new information appearing from documents disclosed in discovery. Whenever taking any factors into account, 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].".*

38. In the **Safeway** judgment, Mr Justice Underhill also referred to the judgment of the Court of Appeal in **Ali v Office of National Statistics** [2005] IRLR 201 where

Lord Justice Waller referred to Mr Justice Mummery's guidance in **Selkent**, pointing out that, in some cases, the delay in bringing the amendment where the facts had been known for many months made it unjust to do so. He continued: "There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time." As Mummery J emphasised in *Selkent*:

> *'…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'*.

39. In **Evershed v New Star Asset Management** UKEAT/0249/09, Underhill J stated that it was *'necessary to consider with some care the areas of factual inquiry raised by the proposed amendment and whether they were already raised in the previous pleading'*. He carried out this exercise himself and concluded that the new evidence would be substantially the same as would be given in respect of the original claim, and, accordingly, allowed the amendment. The Court of Appeal approved this approach and agreed that the amendment did not raise *'any materially new factual allegations'. '[T]he thrust of the complaints in both is essentially the same'*.

40. In **Chandhok v Tirkey** [2015] IRLR 195, the Langstaff J referred to the importance of the ET1 claim form setting out the essential case for a claimant, as follows:

> *"... The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."*

41. In **Abercrombie & Others –v- Aga Rangemaster Ltd** [2013] EWCA Civ 1148 Lord Justice Underhill pointed out that the **Selkent** factors are neither intended to be exhaustive nor should they be approached in a tick-box fashion. There is nothing in the Rules or the caselaw to say that an amendment to substitute a new cause of action is impermissible. Further, at paragraphs 48 and 49 of the *Abercrombie* judgment, Lord Justice Underhill went to say:

> "*Consistently with that way of putting it, the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the*

less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted.... We were referred by way of example to my decision in **Transport and General Workers Union v Safeway Stores Ltd** *(UKEAT/0092/07), in which the claimants were permitted to add a claim by a trade union for breach of the collective consultation obligations under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 to what had been pleaded only as a claim for unfair dismissal by individual employees. (That case in fact probably went beyond "mere re-labelling" – as do others which are indeed more authoritative examples, such as* **British Printing Corporation (North) Ltd v Kelly** *(above), where this Court permitted an amendment to substitute a claim for unfair dismissal for a claim initially pleaded as a claim for redundancy payments.)*

It is hard to conceive a purer example of "mere re-labelling" than the present case. Not only the facts but the legal basis of the claim are identical as between the original pleading and the amendment: the only difference is, as I have already said, the use of the section 34 gateway rather than that under section 23. In my view this factor should have weighed very heavily in favour of permission to amend being granted. As the present case only too clearly illustrates, some areas of employment law can, however regrettably, involve real complication, both procedural and substantial; and even the most wary can on occasion stumble into a legal bear-trap. Where an amendment would enable a party to get out of the trap and enable the real issues between the parties to be determined, I would expect permission only to be refused for weighty reasons – most obviously that the amendment would for some particular reason cause unfair prejudice to the other party. There is no question of that in the present case."

42. In **Vaughan v Modality Partnership** [2021] IRLR 97 at [24], HHJ Tayler reviewed the authorities on amendment. The following principles emerged:

42.1. the fact that an amendment would introduce a complaint which is out of time is a factor to be taken into account in the balancing exercise, but is not decisive [§15];

42.2. the **Selkent** factors should not be treated as a checklist, but must be considered in the context of the fundamental consideration: the relative injustice and hardship in refusing or granting an amendment [§16];

42.3. the Tribunal may need to adopt a more inquisitorial approach when dealing with a litigant in person [§19];

42.4. that balancing exercise should be underpinned by consideration of the real, practical consequences of allowing or refusing an amendment [§21];

42.5. it is important to consider the **Selkent** factors in the context of the balance of justice [§24]

- a minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing;

- an amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim;

- a late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

42.6. where the prejudice of allowing an amendment is additional expense, consideration should generally be given to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it [§27].

42.7. an amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice [§28].

43. I followed the jurisprudence set out above when making my decision, Particularly, I considered all the circumstances and the balance of justice. I make the following findings:

43.1. The claimant only ticked the age discrimination box in her ET1. She must have been aware of all the circumstances she now seeks to add as claims of age discrimination.

43.2. The claimant made one reference to age discrimination in the document submitted with her ET1. At page 16 of the bundle the claimant says she told Mr Singh that, *"…I was being discriminated on my age , sex , marriage…"* but provided no details of what age discrimination was alleged. Telling someone you think you have been discriminated against is not the same as setting out what the discrimination is.

43.3. I find that the exercise is not one of rebadging as the claims are all entirely new. There was nothing to rebadge. The claimant made no reference back to her ET1 or attached document when setting out her age discrimination claims.

43.4. The claimant is not represented between hearings but has had the benefit of counsel representing her at both preliminary hearings.

43.5. The real practical consequences of granting the application would be to potentially save the claimant's entire case of alleged age discrimination. I find that the 13 new allegations range in time from 3 November 2020 to 13 June 2023. As the claimant did not start early conciliation until 10 October 2023, all the claims are out of time and would have to rely on

the discretion of the Tribunal on the just and equitable rule in section 123 of the Equality Act 2010 to succeed.

43.6. Following the guidance of HHJ Tayler in **Vaughan**, I find that the amendment sought is a major amendment as it adds a completely new head of claim that stretches in time over a period of more than two and a half years. However, rejecting the application would still leave the claimant with a substantial case that remains to be litigated.

43.7. I considered granting the application and letting the final hearing decide any time points but found that would still incur more expense to the respondent and the taxpayer and would delay the conclusion of the case.

43.8. The amendment sought is late and would cause the respondent to incur more cost and expend more time. It would cost the taxpayer more expense as it would lengthen the hearing.

43.9. I do not find that the new claims are particularly strong.

43.10. The amendment would result in the respondent suffering prejudice because it would have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim. The respondent would also have to investigate factual matters going back to November 2020.

43.11. I find that the prejudice cannot be ameliorated by an award of costs, or other sanction as the entire case now rests on granting or refusing the application.

43.12. I find that this amendment would have been avoided had more care been taken when the claim was pleaded or defined. That is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost. However, the key point is the balance of justice and hardship and I find that the injustice and the hardship is greater on the respondent than the claimant.

44. I refuse the amendment sought.

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Employment Judge S Shore
Date: 30 September 2024