EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Z Gazerani	**v**	PayPoint Network Ltd

Heard at: Bury St Edmunds **On**: 24 July 2024

Before: Employment Judge Conley

Appearances
For the Claimant: Herself, as a Litigant in Person
For the Respondent: Mr A Watson, counsel

JUDGMENT

The application to amend the claim is allowed in relation to a claim that the respondent discriminated against the claimant by failing to make reasonable adjustments.

The remainder of the application is refused.

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 8 September 2023, the Claimant sought to pursue the following complaints
   I. 'Ordinary' unfair dismissal;
   II. Direct Discrimination on the grounds of her race (she is a Muslim Asian woman).

2. The ET1 was accompanied by a very detailed 'Particulars of Claim' dated 7 September 2023 in which the claim set out comprehensively the history of

her employment with the respondent, and the circumstances which led to her eventual dismissal on 8 June 2023, having been employed since October 2015.

3. The respondent denies the claim and on 15 December 2023 served a Response form which incorporates comprehensive 'Grounds of Defence'. In essence, the respondent asserts that the claimant had poor relationships with nearly all of her managers for the duration of her employment, raising grievances or making criticisms (some of which were personal) against many of them; that she was the subject of serious complaints from both a colleague and a customer; that she responded negatively to attempts to address performance issues; and that ultimately she was dismissed for a range of behaviours including inappropriate and unprofessional conduct, abusive language, upward bullying and confrontational behaviour, and insubordination.

4. The matter was fixed for a full merits hearing for 5 days from the 1 - 5 September 2025, and then came before Employment Judge Postle on 28 May 2024 for a Preliminary Hearing. At the hearing, a List of Issues was settled in connection with the allegations of direct discrimination on the grounds of race (in that she had been treated unfavourably compare to her white British colleague by being dismissed) and unfair dismissal

5. At the hearing the claimant produced an email dated 28 May 2024 in which she indicated a desire to amend her claim to include an allegation that the principle reason for her dismissal was that she had made a number of protected disclosures concerning the respondent's business practices and the working conditions of employees; and further to include a claim that she had also been discriminated against on the grounds of a purported disability (in this case, depression and anxiety). Given the lateness of the application and the fact that, in the view of the Judge it was insufficiently particularised, the Judge made a number of Case Management Orders in relation to the Application to Amend which were to be complied with by 18 June 2024. The case was set down for a Public Preliminary Hearing for the determination of the application on 25 July 2024.

6. In determining this application, I have considered a Bundle containing 89 pages, two documents prepared by the claimant ('Application to Amend Claim' and 'Additional Incidents for Consideration in Whistleblowing Claim'), and the respondent's 'Response and Objection' to the Application.

7. I have also considered the oral evidence of the claimant who gave evidence before me.

THE LAW AND CONCLUSIONS

8. The starting point when considering applications to amend a claim is the case of *Selkent Bus Company Ltd v Moore* [1996] ICR 836 EAT: in determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J explained that relevant factors would include:

9. (1) The nature of the proposed amendment - A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim (often called "relabelling"); and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

10. Mummery J suggests that this aspect should be considered first (before any time limitation issues are brought into the equation) because it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from "relabelling" the existing claim.

11. (2) The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended. If the application is purely relabelling exercise than it does not matter whether the amendment is brought within the timeframe for that particular claim or not – see *Foxtons Ltd v Ruwiel UKEAT/0056/08*. Nevertheless, whatever type of amendment is proposed the core test is the same: namely reviewing all the circumstances including the relative balance of injustice in deciding whether or not to allow the amendment.

12. Whether the claim may be out of time is just one matter that the Judge has regard to in exercising discretion on whether to allow the amendment. It is not necessarily conclusive (HHJ Tayler in *Vaughan v Modality Partnership* UKEAT/0147/20/BA).

13. Different tests apply to the question of an extension of time. In relation to the protected disclosure claim, the test is as set out in section 111 of the ERA 1996 as follows:

> Section 111(2) of the Employment Rights Act 1996 states:

> [Subject to the following provisions of this section], an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal—
>
> (a) before the end of the period of three months beginning with the effective date of termination, 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.

14. The first limb of this test is to be strictly applied. Judge LJ in *London Underground Ltd v Noel* [1999] IRLR 621 said this:

> "By section 111(2)(b) this period may be extended when the tribunal is satisfied 'that it was not reasonably practicable for the complaint to be presented before the end of that period. The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, 'in all the circumstances', nor when it is 'just and reasonable', nor even where the tribunal, 'considers that there is good reason' for doing so."

15. As a starting point, it is necessary to consider a number of factors: (i) To identify the substantial cause of the claimant's failure to comply with the statutory time limit; (ii) To determine whether and if so the claimant knew of his rights; (iii) To determine whether the claimant had been advised by anyone; and iv) To determine the nature of any advice given and whether there was any substantial fault on the part of the claimant which led to the failure to present a claim in time.

16. In relation to the claim(s) for disability discrimination under the Equality Act 2010, under s123(1)(b) of that Act a Tribunal is empowered to grant an extension of time if it considers that it is 'just and equitable' to do so. Where these words appear it has been held that 'Parliament has chosen to give the employment tribunal the widest possible discretion' (per Leggatt LJ in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] IRLR 1050, [2018] ICR 1194 at [17]). As stated by the Court of Appeal in that case, s123 does not prescribe the factors which should be taken into account when exercising the discretion. The discretion is broader than that given to tribunals under the 'not reasonably practicable' formula.

17. Although the test for what is 'just and equitable' is different to the test of what is reasonably practicable (it being wider and more generous to the employee), for the purposes of this claim, in my judgment there is virtually no distinction in terms of the factors that I must consider in reaching my conclusion. There is no rigid checklist either from statute or case law, that I am bound to consider in the exercise of my discretion. In fact, I need to remind myself that:

'There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.' - *Abertawe Bro Morgannwg University Local Health Board v Morgan*

18. That being said, it is useful to address factors which fall into the following three broad categories: (1) the length of and reasons for the delay; (2) the prejudice which each party would suffer as a result of granting, or refusing to grant, an extension; and (3) the potential merits of the claim.

19. The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. 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 on discovery.

20. Delay may count against the applicant because the Overriding Objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. The later the application is made, the greater the risk of the balance of hardship being infavour of rejecting the amendment - see *Martin v Microgen Wealth Management Systems Ltd EAT 0505/06*. However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings.

21. *Ladbrokes Racing Ltd v Traynor* EATS 0067/06 states that the Tribunal will need to consider: (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

22. These factors are not exhaustive and there may be additional factors to consider, eg the merits of the claim.

23. The law has been clarified in the more recent case of *Vaughan v Modality Partnership* [2021] ICR 535 EAT in which HHJ Tayler provided guidance on the correct approach to adopt when considering an application to amend.

24. Referring to *Selkent* he noted that the list of relevant factors set out therein did not mean that tribunals should adopt a check-list approach, as emphasised by Underhill LJ in *Abercrombie v Aga Rangemaster Ltd* [2014] ICR 209, CA, which contained this passage (at §48) "… the approach of both the Employment Appeal Tribunal 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 inquiry 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."

25. In *Vaughan*, there is this summary of the correct approach to take: "Representatives would be well advised to start by considering, possibly putting the *Selkent* factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding…It will often be appropriate to consent to an amendment that causes no real prejudice...The balancing exercise always requires express consideration of both sides of the ledger, both quantitatively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice."

26. Finally, he gave a reminder that no one factor is likely to be decisive. The balance of justice is always key.

CONCLUSIONS

27. In this case, the application seeks to introduce two completely new heads of claim: the first being a claim pursuant to Section 47B of the Employment Rights Act 1996, that she suffered detriments (namely bullying and harassment, discrediting (*sic*) and humiliation, exclusion from social gatherings) as a result of having made a series of what she asserts to be protected disclosures to the respondent concerning alleged unethical working practices in relation to their customers and their staff; and in relation to pressure placed upon staff to meet targets; and the second being a number of claims under the Equality Act 2010 for discrimination on the grounds of disability. Therefore this application does fall within the third category of application identified in *Selkent.*

28. The latter, according to the claimant's application, includes both direct and indirect discrimination, and failure to make reasonable adjustments, and therefore in fact would amount to three distinct claims.

29. Given the fact that the application involves significant substantive amendments to the claim which would of necessity require a degree of further preparation on the part of the respondent (at the very least a further response but in all likelihood, considerably more than that), my starting point must be that there is bound to be some prejudice to them. It also requires that I go on to consider the next of the factors, namely whether the Tribunal has jurisdiction to consider the new claims. There is no question that all of the proposed amendments fall outside of the 3 month time limit and therefore would be time barred, unless the Tribunal is satisfied that an extension of time would be appropriate.

30. In this case, the only explanation that the claimant offered for her failure to include any of the propose amendments in her original claim was that, at the time she completed her ET1 she took some advice from ACAS to the effect that if she included too much in her claim then she ran the risk that the whole claim might be 'thrown out'.

31. She was not advised by solicitors, but did receive some advice from ACAS, which she may well have misunderstood; but I am satisfied that she did have an understanding of her rights, albeit a limited one, and that she knew that time limits were application to claims brought before the Employment Tribunal.

32. In my judgment there can be no possible basis for concluding that it was not reasonably practicable for the claimant to have presented the 'protected disclosures' claim at the outset. According to her written application and the evidence that she gave before me at the hearing, the making of these disclosures was a central cause of the alleged mistreatment that she received at the hands of the respondent and which led ultimately to her dismissal. These were facts that were within her own knowledge and there was no reason why she could not have cited them in her original claim, and they were so important (the importance of them was strongly emphasised during the course of the evidence that that claimant gave before me) that it seems inconceivable that they would be completely omitted from the narrative that she provided in her ET1, irrespective of any advice that she may have received to err on the side of brevity.

33. The claimant gave evidence that she received confusing or misleading advice from ACAS: however as I say, this would not explain why she decided to edit from her detailed narrative any mention of the disclosures. If this amendment were to be allowed, it would result in there being two conflicting narratives from the claimant as to what took place in the lead up

to her dismissal, which would not only make it difficult for the respondent to provide a response, but would potentially also undermine the claimant's existing claims and create confusion for the Tribunal that ultimately hears the case.

34. Even if it had not been reasonably practicable to present this claim within the time limit, it is impossible for me to see how it could be said that a further delay of 8 months before bringing the application to amend would be 'reasonable'.

35. This delay is also relevant for the purposes of the second of the *Selkent* criteria. The new claims, coming as they do at a point at which the respondent will have already incurred costs in addressing the original claim, will cause the respondent to incur expense and inconvenience in dealing with the new claims. As the respondent submits, it would add considerably to the scope of the final hearing, and therefore the length of the hearing and the cost to the Respondent of defending the claims. I accept this submission.

36. Of more concern however is the practical and evidential difficulty that the delay will cause the respondent in actually meeting these additional claims. As the respondent has submitted, they will be prejudiced by the long duration of the events, the fact that memories of their existing and potential witnesses will have faded, and the fact that two key witnesses named in the 'whistle-blowing' claims - Louise Edwards and Jessica Carruthers - are no longer employed by the respondent. This undoubtedly will be greatly to their prejudice.

37. Finally, in relation to the manner of the application, despite having been given clear direction by Judge Postle as to the key details that must be provided for this application to succeed, the application before me remains generic and lacking in particularity.

38. Whilst acknowledging the inevitable (and terminal) prejudice that the claimant will suffer if she is not permitted to pursue the whistleblowing claim, I consider that there would be greater prejudice to the respondent in allowing the application. Given the merits of the case, which I assess (on limited information it has to be said) to be poor, I consider that there is limited injustice to the claimant in making this decision - and arguably would enable her to concentrate her submissions upon the existing substantive claim which on its face has greater merit. This part of the application is therefore refused.

39. In relation to the disability discrimination claim the position is less clear because the test in to be applied in relation to time limits is more forgiving

to the claimant; and it must also be noted that, whereas the protected disclosures do not feature anywhere in the original claim, there is at least some mention of the mental ill health that the claimant was suffering from at the time of the events to which her claim relates, and in particular there is reference to a period of sickness absence associated with work; and to having been taking medication and receiving counselling and support for her mental health as a result of a recommendation by the respondent.

40. I am still troubled by the lack of particularity in relation to the disability claim, and I cannot discern any direct or indirect discrimination claim on the face of the written application. However, I do find that there is a proper basis for pursuing a 'reasonable adjustments' claim and I cannot at this stage dismiss the possibility that a Tribunal, having considered the evidence as a whole, would not conclude that it would be 'just and equitable' to extend the time limit for the purposes of such a claim.

41. I also consider that there is far less prejudice to the respondent in addressing the issues raised in relation to a limited disability discrimination claim for failing to make reasonable adjustments than there would be in addesssing a wide-ranging whistle-blowing claim.

42. As I indicated, the 'reasonable adjustment' claim still lack the particulars that one would want to see in terms of dates and details. In particular, the 'Provision, Critierion or Practice' will have to be reconsidered at a further Case Management Hearing in order to be more clearly defined.

43. However, one has to approach this pragmatically, allowing for the fact that, if the Respondent is simply not able to respond to an allegation because it is too vague or unspecified, then that allegation cannot succeed.

44. I have therefore concluded that, so far as the disability discrimination claim (failure to make reasonable adjustments) is concerned, the prejudice to the respondent is outweighed by the potential injustice to the claimant and the application is allowed to this limited extent only.

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Employment Judge Conley

Date: 21 October 2024

Sent to the parties on: 23 October 2024

For the Tribunal Office