# EMPLOYMENT TRIBUNALS

**Claimant:** Miss R Hammond

**Respondent:** IG Doors Limited

**Heard:** via telephone **On:** 22 July 2020

**Before:** Employment Judge S Jenkins

**Representation**
Claimant: Mr N Vidini (Solicitor)
Respondent: Ms K Davis (Counsel)

# RESERVED JUDGMENT

1. The Claimant's application to amend her claim, to include a claim of victimisation under section 27 of the Equality Act 2010 and additional protected disclosures, is refused, but the application to include two additional detriments is granted.

2. The Respondent's application for a deposit order is refused.

# REASONS

**Background**

1. This hearing was to consider whether the Claimant needed permission to amend her claim form, and, if so, whether to grant that permission; and to consider the Respondent's application for an order that the Claimant pay a deposit as a condition of pursuing her claims.

2. A previous preliminary hearing had taken place in relation to this case, on 17 April 2020, before Employment Judge Brace. In the Preliminary Hearing Summary ("Summary") issued following that hearing, Judge Brace had noted that the Claimant's original claim form, submitted on 12 February 2020 when she was not represented, indicated that she was pursuing claims of pregnancy or maternity discrimination and whistleblowing detriment. She noted that the Claimant's lengthy attachment to her claim form, which set out the factual background to her complaints, was essentially about her treatment by the Respondent whilst she was on maternity leave, and on or following her

return to work from maternity leave on 16 September 2019, and also her treatment by the Respondent, which she says was as a result of her making a protected disclosure or disclosures.

3. The Summary noted that discussion took place about the possibility of the claim being amended, but the focus of that appeared to be on the possibility of amendments to deal with additional matters arising since the submission of the claim form, the Claimant remaining in employment at that time although it now seems that her employment has ended. Judge Brace noted that if the Claimant wished to amend her existing claim rather than issue a fresh claim in respect of such matters then she would need to send in full particulars. She provided guidance as to what that application should include, and highlighted the two main legal authorities which the tribunal would consider when faced with applications to amend.

4. Judge Brace then went on in the Summary to clarify the claims and issues which appeared to arise within the initial claim form and attachment. In terms of the potential legal claims identified, they were as follows:

   (i) Pregnancy/maternity detriment and/or discrimination under either or both section 47C of the Employment Rights Act 1996 ("ERA") and section 18 of the Equality Act 2010 ("EqA").
   (ii) Harassment related to sex under section 26 EqA.
   (iii) Victimisation under section 27 EqA.
   (iv) Whistleblowing detriment under section 47B ERA (incorrectly described in the Summary as section 47C).

   It appears that a claim of harassment is not now being pursued.

5. Judge Brace ordered the Claimant to provide further particulars of the protected disclosures she alleges she made, and for her to review the complaints set out in the Summary and confirm whether they accurately reflected the claims brought in relation to pregnancy and maternity. The Respondent was then given an opportunity to submit an amended response addressing the complaints as then clarified, and to confirm its position as to whether the clarified claims involved any amendment, and whether it consented to any amendment.

6. The Claimant, having by then instructed a solicitor, provided that further information by way of further and better particulars ("F&BPs") submitted on 22 May 2020. and, at that time, made a formal application to amend the claim to include claims of unauthorised deductions from wages and breach of contract, although she contended that this amounted to "relabelling" and therefore should straightforwardly be granted.

7. The Respondent provided its amended response on 28 June 2020 and also summarised its position with regard to the clarified claims. In that regard, the Respondent accepted that the amendment to the claim to include claims of unauthorised deductions from wages and breach of contract was indeed a matter of relabelling, as complaints regarding failure to pay sick pay and to reimburse training fees had been included in the original claim. However, the Respondent objected to the clarification of other elements, contending that they included new matters and claims which had not been canvassed within the original claim form.

8. Specifically, the Respondent contended that the clarification that a claim of victimisation under section 27 EqA was to be brought would require consideration of a formal application to amend, as would the addition of four further alleged protected disclosures, all of which had been made before the Claimant went on maternity leave, and certain newly included detriments. The Respondent also resisted the application to amend to include further claims under section 47C ERA, noting that the clarification in this regard appeared to be confused and to relate to matters not capable of being considered in law, as there were references within the F&BPs to those claims involving protected disclosures, whereas section 47C only deals with detriment relating to family reasons. (I observe that this may have arisen due to the typographical error in the Summary where the reference to whistleblowing detriment as relating to section 47C ERA should have been to section 47B).

9. The Claimant contended that the F&BPs did not contain any additions, but only elaborations of what was in the claim form, and also noted that the reference to section 47C ERA related to the fact of the Claimant taking maternity leave. The Claimant also noted that she had not been represented at the time she submitted her claim, and therefore the further clarification she was now providing should be accepted without the need for amendment.

10. The Respondent, whilst accepting that providing further detail of a claim form is acceptable, contended that that did not allow the Claimant to introduce new facts or new claims without permission to amend. The Respondent accepted that the Claimant had been a litigant in person when the claim form had been submitted, but also noted that a litigant in person would be expected to set out their case in terms of the broad underlying facts.

## Amendment

Issues and Law

11. The principal guidance relating to applications to amend is found in the cases of Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650 and Selkent Bus Company Ltd v Moore [1996] ICR 836. I was also mindful of the Presidential Guidance Note 1 on Case Management dealing with applications to amend.

12. The guidance provided by Cocking is that the key principle when considering the exercise of the discretion to allow an amendment is to have regard to all the circumstances, and in particular any injustice or hardship which would result from the amendment or refusal to amend.

13. In Selkent, the Employment Appeal Tribunal set out a non-exhaustive list of relevant factors which are to be taken into account in considering the balancing exercise of all the relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by the granting or refusing of the amendment. These were; the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

14. The Presidential Guidance reaffirms the Cocking and Selkent guidance, noting that relevant factors include the three matters outlined in Selkent, and

also noting that tribunals draw a distinction between amendments which seek to add or substitute a new claim arising out of the same facts as the original claim, and those which add a new claim entirely unconnected with the original claim.

Conclusions

15. Considering first the claim of victimisation under section 27 EqA, whilst there were several references to "victimisation" within the attachment to the claim form, it was throughout used in its ordinary sense, i.e. in terms of being "picked upon" or "bullied", and did not specifically refer to any form of protected act. Indeed, the specific section of the attachment to the Claimant's claim form (section 8, entitled, "Victimisation/Harassment"), in which she referred to having been "victimised", appears to raise issues of "victimisation" only in the context of retaliatory treatment arising from the protected disclosures the Claimant asserts she made, and not in the context of any concern about discriminatory treatment. On my reading therefore, the initial claim had not included a claim of victimisation under section 27 EqA and would therefore need to be considered by way of an application to amend.

16. In the circumstances, I therefore considered whether it would be appropriate to allow an amendment to include such a claim, and, applying the guidance from Cocking and Selkent, I concluded that it would not be appropriate to allow such an amendment.

17. The nature of the proposed amendment was substantial, encompassing an entirely new head of claim which would involve a substantively different analysis to the other discrimination claims being advanced. It was also canvassed for the first time at the hearing on 17 April 2020, and raised formally in the F&BPs on 22 May 2020, and therefore had been raised out of time. I concluded therefore that the balance of hardship lay with the Respondent. If an out of time victimisation claim was pursued, it would be faced with dealing with fresh allegations, both in terms of the question of whether there had been a protected act or acts and whether there had been any detrimental treatment arising from it or them. The Claimant, on the other hand, will still be able to pursue her claims of pregnancy/maternity discrimination and protected disclosure detriment, which, from the attachment to her claim form, seem to be the matters that have given her cause for concern and to pursue matters before the Employment Tribunal. Overall therefore, the balance of hardship lay with the Respondent and against allowing that amendment. The section of the F&BPs under the heading "Victimisation", paragraphs 6, 7, and the first paragraph 9 (there is a typographical error in the document, with the paragraph following 7 being recorded as 9, and then with further paragraphs 8 to 27 following on after the first paragraph 9), shall therefore be excluded.

18. Turning to the additional protected disclosures, these were fresh matters, not included in the initial claim, and therefore, again, required consent to amend. I again concluded that that application should be refused. The Claimant had had every opportunity to raise what she factually contended to have been protected disclosures made prior to commencing her maternity leave, but did not, and, bearing in mind that she will be able to pursue a claim of detriment arising from the asserted protected disclosure that she set out within original claim form, I did not consider it appropriate to allow an amendment to include

any additionally asserted disclosures, as the Respondent will be faced with responding to issues relating to events which happened a significant time ago. The section of the F&BPs under the hearing "Whistleblowing (Section 47B of the ERA)", paragraphs (second) 9 to 12, shall therefore be excluded.

19. I also needed to consider whether two freshly asserted detriments, sub-paragraphs (g) and (h) of the first paragraph 9, should be permitted. Whilst these were included in the section relating to victimisation, which I have not allowed to be progressed, by cross-reference, the Claimant has also asserted that those detriments apply to her whistleblowing claim, although the reference is, in error, to paragraphs 8 (a) – (h) when it should be to the first paragraph 9 (a) – (h).

20. In the circumstances, I considered that, on balance, this application to amend should be allowed. The prospect of adding in further matters that had arisen since the date of the Claim Form had been discussed at the hearing before Judge Brace, and these were two minor matters relating to the Claimant's grievance appeal. Whilst dealing with those points, will involve the Respondent in dealing with some further factual issues, they are not significant, and it seemed to me that, whilst the dates were not entirely clear, these matters , when viewed from the perspective of the hearing on 17 April 2020, would seem to have been in time at that point. I therefore considered that the balance of hardship lay with the Claimant and in favour of granting the amendment.

21. Finally, with regard to the reference to claims of whistleblowing detriment under section 47C ERA, as I have mentioned above, I considered that those matters may have been included following some confusion due to the incorrect section number being included within the Summary. The particular matters raised within the F&BPs relate to qualifying disclosures regarding pregnancy and maternity. Those are matters that have either been encompassed within the claim under section 47C ERA relating to detrimental treatment on the grounds of pregnancy or maternity more generally, or under section 18 EqA and therefore it is not appropriate to allow any amendment to encompass any further claims in respect of those matters. The section of the F&BPs under the hearing "Whistleblowing (Section 47C of the ERA)", paragraphs 18 to 22, shall therefore be excluded.

**Deposit Order**

22. The Respondent had made an application for a deposit order in respect of the Claimant's claims of whistleblowing detriment under section 47B ERA, of pregnancy and maternity discrimination and/or detriment under section 18 EqA and/ or section 47C ERA, and of unauthorised deductions from wages and/or breach of contract in relation to the training fees and sick pay elements of the claim.

23. The Respondent contended that, in respect of the claims under section 47B, the Claimant had little reasonable prospect of establishing that she had made a protected disclosure and, even if she could establish that, she would have little reasonable prospect of establishing a connection between any disclosure and the treatment of which she complained. Similarly, with regard to the claims of pregnancy and maternity discrimination and detriment, the Respondent contended that that the Claimant would have little reasonable

prospect of establishing those claims, bearing in mind that she had returned from maternity leave for only a matter of two days before commencing a period of absence. Finally, with regard to the breach of contract and unauthorised deduction from wages claims, the Respondent noted that the Claimant's contract of employment provided that company sick pay would be paid at the Respondent's absolute discretion and that the threshold for establishing a breach of contract in that context would be very high. The Respondent also contended that there was no contractual entitlement to reimbursement of training fees and that the Claimant had, on a previous occasion, signed the required agreement catering for the re-payment of any fees reimbursement before any such reimbursement had been made, which she had refused to do in the claimed instance.

24. The Claimant noted in response that a deposit order would not be appropriate where consideration of it would require a ”mini trial” of the facts. It was contended that there were fundamental areas of factual dispute, even in the context of the breach of contract and unauthorised deductions from wages claims, where it was contended that there had been promises to pay sick pay and to reimburse the fees.

Issues and law

25. Rule 39 of the Employment Tribunals Rules of Procedure provides that where a tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.

26. In terms of the test to be applied in the assessment of whether a specific allegation or argument has little reasonable prospects of success, guidance has been provided in various decisions of the Employment Appeal Tribunal. It has been made clear that the test is plainly not as rigorous as the test of “no reasonable prospects” required in respect of a strike out application under Rule 39, and that a tribunal has greater leeway when considering whether to order a deposit. However, as was made clear in the case of Van Rensburg v The Royal Borough of Kingston upon Thames (UKEAT/096/07), the tribunal must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.

27. In Hemdan v Ishmail [2017] ICR 486, Simler P noted that, “a mini-trial of the facts is to be avoided”, and that, “if there is a core factual conflict, it should properly be resolved at a full merits hearing where evidence is heard and tested”.

Conclusions

28. In relation to each of the areas in which the Respondent sought deposit orders, I did not consider it appropriate to grant the application. I was mindful of the direction provided by Hemdan that a mini trial of the facts is to be avoided, and if there is a core factual conflict, it should properly be resolved at a full merits hearing where evidence is heard and tested.

29. In relation to the claims of whistleblowing detriment under section 47B, ERA, and of pregnancy and maternity discrimination and detriment under section

18 EqA and section 47C ERA, the claims will involve the need to address a range of factual matters and I did not consider it appropriate to undertake any form of "mini trial" consideration of the facts in the circumstances. Even in relation to the unauthorised deductions from wages/breach of contract claims, where I had sight of the Claimant's contract and could see the particular wording regarding sick pay, and where I also had sight of the proposed training fee agreement and emails surrounding it, I noted the Claimant's contention that she would be relying on verbal promises as opposed to the express written contractual terms. In the circumstances, I also did not think it appropriate to order a deposit in respect of those claims due to the potential extent of the areas of factual dispute.

30. I make it clear that the refusal to grant the deposit order application should not be taken by the Claimant as any indication that the claims have reasonable prospects. It may ultimately turn out that they do indeed have little reasonable prospect of success, but that view will only be able to be reached upon consideration of all the evidence in relation to the claims and where that evidence is able to be properly tested.

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Employment Judge S Jenkins

Date: 14 August 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 20 August 2020

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FOR EMPLOYMENT TRIBUNALS