EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100377/2021

Open Preliminary Hearing Held by CVP on 8 June 2022 at 10.00am

Employment Judge: Russell Bradley

Kerry Stirling — **Claimant**
Ms C Cochrane
Solicitor

The Mind's Well — **Respondent**
Ms M Naranjo
Director

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's application to amend her claim by adding Maria Therese Naranjo as a second respondent under Rule 34 of the Employment Tribunal Rules of Procedure 2013 is refused.

REASONS

Introduction

1. On 21 March 2022 an emailed notice fixed this preliminary hearing. It followed an Order by EJ McFatridge at a telephone conference preliminary hearing on 16 March.

2. On 25 January 2021 the claimant presented an ET1 in which various claims were made. At that time she was unrepresented. On 24 March 2021 the case was considered at a telephone conference case management preliminary hearing by EJ Porter. By that time the claimant had solicitor representation. Various orders were made.

3. In short summary the claimant makes claims of discrimination under sections 13,15,20 and 26 of the Equality Act 2010. She relies on the protected characteristic of disability. She also maintains a claim of breach of contract. The claims are resisted by the respondent, her former employer. The claimant's case is currently set out in a redlined version of further and better particulars prepared on 6 April 2022. The respondent sets out its answer in an (undated) amended response document. It contains 21 paragraphs over 11 pages.

4. The claimant was not present at this hearing. Ms Cochrane made a submission in her absence.

5. There was some doubt as to whether the hearing should proceed given that Ms Naranjo intended to give evidence from Spain. As of 6 May 2022 she was no longer resident in the UK. The very recent enquiries which had been made had not concluded to ascertain whether the State of Spain objected to evidence being given orally by Ms Naranjo to the Tribunal from within its territory. At the outset of the hearing and in discussion with her, it became apparent that Ms Naranjo was content to proceed by making an oral submission. She did not give evidence. I took account of paragraph 7 of the relevant Presidential

Guidance dated 27 April 2022, "*Permission is not required for written evidence, or for submissions (whether oral or written)*."

6. At the outset, we discussed the relevance of a witness intended for the respondent, Ms P Tennant. Ms Naranjo explained that she intended to elicit evidence as to her own character from Ms Tennant. I explained that I did not see it as relevant to the issue. Ms Naranjo agreed and was content to proceed without Ms Tennant.

7. The claimant lodged no factual documentation relevant to the issue in dispute. Ms Cochrane lodged and spoke to two reported decisions. I say more on them below. Both were referred to in her email of 24 January, see paragraph 13 below.

8. The respondent had sent about 40 emails and other material the day before the hearing. In discussion with her Ms Naranjo accepted that only two documents may be relevant and to be relied on. For ease of identification, she undertook to email both after the end of the hearing which she did later in the day. They were (i) an "*Outcome of Qualification Verification Activity*" pro forma document dated 27 August 2021; and (ii) a print of four emails in the period 16 December 2020 to 6 January 2021 between Ms Naranjo and Paul Wistuba, Malpractice & Complaints Advisor of the Scottish Qualifications Authority.

9. Ms Cochrane was permitted 7 days in which to comment on them if she saw fit. In an email of 15 June, she did. On the material provided by the claimant Ms Cochrane said, "*I note Ms Naranjo's comments at the Preliminary Hearing on 8th June 2022 that she at times interacted with Ms Stirling in the capacity of a tutor, and at other times in the capacity of employer. Ms Naranjo noted that she undertook two different roles and those roles ought to be treated differently. She noted that as a tutor she received visits from the SQA every year and that her systems, policies and procedures were reviewed by an external inspector. I note that Ms Stirling made a complaint to the SQA about the Mind's Well which was not upheld. I would respectfully submit that the above matters are*

not relevant to the question presently before the Tribunal: namely, whether Ms Naranjo should be added as an additional respondent. The claims brought by Ms Stirling relate to actions undertaken by Ms Naranjo as Ms Stirling's employer, not as her tutor. Details of some incidents which pre-date Ms Stirling's employment are included in the Further & Better Particulars under the heading "Additional background information". This information is of relevance in establishing the respondent's knowledge of Ms Stirling's disability. The claims brought by Ms Stirling under the Equality Act 2010 all relate to incidents which took place after the commencement of her employment around the end of April 2020. Notwithstanding the above, should the Tribunal consider that any of the claims brought by Ms Stirling did not arise out of the employment relationship between the parties then I would expect that the Tribunal would find that it did not have jurisdiction to consider such matters, in which case there would be no prejudice to Ms Naranjo in being included as an additional respondent."

10. I have taken account of the two documents along with the claimant's comments on them. I agree that they are not relevant to the issue which I have to decide.

11. However, Ms Cochrane's email of 15 June goes further than answer the respondent's material. She sets out her position on a separate matter. I repeat it here, "*During the Preliminary Hearing, Employment Judge Bradley noted that the basis of Ms Naranjo's liability as pled in the amended Further & Better Particulars refers to her being an employee of the Respondent, but that it does not necessarily follow from the fact that she was CEO that she was also an employee. It was assumed at the time of amending the Further & Better Particulars that Ms Naranjo was an employee, but I take the point that this cannot be assumed. The relevant sections of the Equality Act confer liability on employees or agents, and I would submit that if Ms Naranjo was not an employee of the organisation then she would likely have been its agent. I have made some further amendments to paragraphs 11, 12 and 13 of the Further & Better Particulars, shown in tracked changes on the attached document, to reflect this. In the event that the application to add Ms Naranjo as a respondent*

is allowed, I would respectfully request that the Claimant be permitted to make the further minor amendments shown in the attached document in accordance with rule 29 of the Employment Tribunals Rules of Procedure 2013. The nature of the proposed amendment is a re-labelling exercise. I consider that an order in the terms requested would assist the tribunal in dealing with the proceedings efficiently and fairly and in accordance with the overriding objective. I confirm that this email has been copied to Ms Naranjo. Should the Respondent wish to object to the further proposed amendments they should do so by contacting the Tribunal office as soon as possible." In my view it is inappropriate and unfair on the respondent to seek to make further changes to the claimant's case in this way for at least two reasons. First, the extent to which Ms Cochrane was permitted to comment was limited to the material provided by the respondent at the end of the hearing. This additional submission goes further and relates to a separate matter. She has gone beyond what was permitted. Second, it seeks to add an entirely new basis for establishing liability against Ms Naranjo. In my view this is outside the scope of the enquiry for this hearing. Put shortly, it was fixed to consider whether to amend the claim by adding her on the pled basis that what was done was in "*the course of her employment*". It is self-evidently a different and new basis if the claimant now seeks to argue for her amendment because Ms Naranjo *"would likely have been its agent*".

The issue

12. The issue was fixed by the Notice of Hearing. It was "*to decide whether or not to allow the amendment and add Ms Naranjo as an additional respondent*."

The application to amend

13. On 24 January and after (i) setting out the amendment sought and (ii) Rule 34 in full, Ms Cochrane said, "*It is submitted that there would be greater hardship and injustice to the Claimant if this application were refused than there would be to the Respondent and the proposed Second Respondent if the application was granted (**Selkent Bus Company Ltd v Moore** [1996] IRLR 661). The Claimant has become aware that the Respondent has ceased trading and may apply to be formally struck off in the near future. In these circumstances, the*

*Claimant considers that the prospects of recovery of any award made against the Respondent are very low. As every allegation against the Respondent relates to Ms Naranjo's conduct, it is submitted that it would be appropriate to add her as a second Respondent in an individual capacity and that it would be in the interests of justice to do so. The Further and Better Particulars for the Claimant which were sent to the Tribunal on 7 April 2021 make clear that every allegation against the Respondent relates to Ms Naranjo's conduct. As CEO and Director of the Respondent, Ms Naranjo has been involved in the present proceedings from the outset and is or ought to be fully aware of the allegations which have been made against her. While no Acas Early Conciliation certificate has been obtained with Ms Naranjo named as a respondent, it is submitted that this is not a prerequisite to Ms Naranjo being added as a Respondent under rule 34 (**Mist v Derby Community Health Services NHS Trust** UKEAT/0170/15/MC). It is submitted that there would be no adverse effect on Ms Naranjo as a result of losing the opportunity to engage in Early Conciliation as an individual, as she had the opportunity to participate in the process as director/CEO of The Minds Well. The Claimant was not legally represented at the time when she initiated Early Conciliation or drafted her claim and was not aware of the possibility of including Ms Naranjo as a Respondent. It was not considered to be necessary to make an application to add Ms Naranjo as a Respondent at any earlier stage in proceedings as the Claimant believed that The Mindswell was still trading. It is submitted that to have made this application at an earlier stage would have incurred unnecessary delay and expense. Given the recent change of circumstances, however, it is the Claimant's position that the addition of a second Respondent would be in accordance with the overriding objective of dealing with the proceedings fairly and justly*."

14. On 16 March both parties were represented at a teleconference call with EJ McFatridge as they were before me. The claimant's email of 24 January was considered at it. This hearing was fixed. The claimant was allowed 21 days in which to provided further and better particulars of the amendment application. EJ McFatridge's first order records that "*The claimant will set out the factual*

and legal basis as to why Ms Naranjo as an individual should be a respondent to the claim."

15. On 6 April the claimant intimated a redlined version of further and better particulars. She did so in order to set out the basis of her amendment. In it (at paragraph 7) she avers that Ms Naranjo is the CEO, founder and director of the respondent. At paragraphs 11 to 14 and under the heading of "***Liability of Maria Naranjo under section 110 EqA 2010***" the claimant set out the basis on which she considers that Ms Naranjo is liable. In summary, she avers that; Ms Naranjo was at all relevant time the directing mind and will of the respondent; she is the CEO, founder and director; as CEO she was an employee; she had responsibility for its day to day running; the actions complained of were done by her "*in the course of this employment*"; and she referred to sections 109(1) and 110(1) of the 2010 Act.

16. On 29 April the respondent emailed a short (4 paragraphed) reply. In it, it said,
    1. "*I consider that this claim to include Ms Maria Naranjo as respondent is out of time as the events took place in December 2020. I was not Ms. Stirling direct line manager at the time.*
    2. *I do not understand what new information has been added as additional particulars.*
    3. *Hence, I am unsure what the claims against me are.*
    4. *From 6th May 2022 I will not be longer a resident in the UK. I will forward the relevant documents from the consulate as soon as I have them*."

Evidence

17. By agreement, I heard no evidence from either party.

Submissions

18. Ms Cochrane made an oral submission. I do not repeat it. She referred to the decisions in ***Selkent*** and ***Mist***. She said that; greater injustice would be caused to the claimant if refused than to the respondent if allowed, that prejudice being

that she would likely be left with no remedy by reason of the respondent's lack of funds or insolvency; no additional facts are being averred about the basis of the claim; Ms Naranjo was the CEO, director and directing mind and will of the respondent and referred to section 110; Ms Naranjo was involved from the outset and was aware of the nature of the claims being made; no additional costs would be incurred if the amendment was allowed; none of the claims related to the conduct of the claimant's line manager D Marshall; on the contrary, each related to Ms Naranjo. She explained that she had learned on 17 January from the respondent's previous solicitors that it had ceased trading and that she had acted within a week (i.e. by 24 January) in seeking to amend. She accepted that a relevant (albeit not determinative) factor was that the institution of the claim against Ms Naranjo would be out of time relative to when the claim was first presented. However, she said that fact did not change the nature of the evidence which would have to be heard at a final hearing, in other words the factual basis of the claim remained the same irrespective of whether there were one respondent or two and thus there was no prejudice to Ms Naranjo. The application was not made at an earlier stage because it was believed that to have done so would have caused unnecessary delay and expense.

19. Ms Naranjo made a short reply. She referred to intimation of early conciliation to the respondent. She referred to a grievance raised by the claimant against the respondent which she said had not necessarily been about her personally. She referred to two different roles or capacities in which she had engaged with the claimant, one being a tutor, the other as director of the respondent, her employer. She argued that if the complaint related to the tutor role, the complaint would require to be considered by the Scottish Qualifications Authority. She referred to an allegation of "*malpractice*". She said that she had been a champion of the rights of disabled people since 2003, referring materials publicly available on the internet. She asserted that there was no allegation against her personally by the claimant as tutor or as employer and referred to the claimant's wish to become a partner in the business of the respondent. She explained that the respondent was insolvent and she was

intending to appoint an insolvency practitioner to the respondent's business. In answers to questions from me under reference to material from Companies House she agreed that the respondent is a company limited by guarantee. She was unable to confirm that if (as per a statement of guarantee lodged there on 17 February 2014) the respondent company were wound up while she was a member, or within one year after cease to be a member, she would contribute to the assets of the company by such amount as may be required for payment of debts and liabilities of the company contracted before she ceased to be a member; payments of costs, charges and expenses of winding up, and; adjustment of the rights of the contributors among ourselves, not exceeding the specified amount (£1.00).

The law

20. Rule 34 provides that "*The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included.*"

21. The decision of the EAT in ***Selkent*** (cited by the claimant) contains general guidance to employment tribunals in relation to amendments (recognised as such in the Court of Appeal in ***Ali v. Office of National Statistics*** [2005] IRLR 201). I refer to that guidance below.

22. In ***Argyll & Clyde Health Board v Mr A Foulds & Others*** UKEATS/0009/06/RN the Scottish EAT (Lady Smith) considered the question of amendment by bringing in (in that case) a third respondent about four months after presentation of the ET1. At paragraph 40, Lady Smith said, "*If it was being presented outwith that time limit the tribunal need to look at the explanation given for that having occurred: Why were the respondents not included in the original claim? What was known by the claimant and/or his*

solicitor about their potential as relevant respondents at that time? What should have been known? When did the claimant and/or his solicitor realise that the respondents ought to be included? What steps were taken after that? What was the reason for any delay thereafter? Did the claimant and/or his solicitor take prompt action once the need to seek to include the respondents was realised or not? If not, why not? Would there be injustice or hardship to the claimant if the application were refused? If so, of what nature? What would be its cause? Would there be injustice or hardship to the respondents in being brought in as respondents at this stage?"

Discussion and decision

23. ***Mist*** is authority for the proposition that a claimant is not required to undertake early conciliation in respect of an application to amend to include a claim against a second or another respondent. The claimant at that stage is no longer a "*prospective claimant*". They have already presented a claim form and is asking for leave to amend it. I have no difficulty with that proposition. Ms Naranjo did not argue that it was not relevant.

24. On the application to amend, it is convenient to set out the guidance from the EAT in ***Selkent***.

> *1. 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. 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 for 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 have to decide whether the amendment sought is one of the minor matters 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 that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978. (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 Regulations of 1993 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 on discovery. Whenever taking any factors into account, 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.

25. In my view, the starting point is to consider the claimant's answer to what was required by EJ McFatridge's order; the factual and legal basis as to why Ms Naranjo as an individual should be a respondent to the claim. The legal basis is said to be section 110(1) of the 2010 Act. It provides, *"(1) A person (A) contravenes this section if—(a) A is an employee or agent, (b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and (c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be)*." Section 109(1), (2) and (3) provides, *"(1) Anything done by a person (A) in the course of A's employment must be*

treated as also done by the employer.(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal. (3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval." The relevant factual basis (with section 110 as the pled legal framework) is said to be that as CEO Ms Naranjo was an employee of the respondent. I had no evidence which would have allowed me to make that important finding. There was no dispute that Ms Naranjo was and remains a director. Ms Cochrane accepted that there is a distinction between holding office as director and being engaged as employee. She accepted that in this case the latter could not be assumed from the former. She accepted that there was no evidence before me that Ms Naranjo was also an employee of the respondent. I reminded her of the statutory provisions governing a company's obligations to keep a copy of a director's service contract which (even if not in writing) required to be kept in a written memorandum (section 228 of the Companies Act 2006). In my view therefore the factual basis which underpins the amendment was not supported by any evidence. Inevitably therefore the amendment cannot be allowed.

26. Separately, even if I had accepted that the amendment had merit under section 110 of the 2010 Act, I would not have been persuaded to allowed it. A claim against Ms Naranjo made in January 2022 would quite obviously be out of time. The claimant was first legally represented in this case by March 2021. It was open to her at any stage since its presentation to seek to add Ms Naranjo as a respondent. Ms Cochrane agreed that the catalyst for doing so was the apparent imminent insolvency of the respondent. If (as the claimant's argument relied on) the case is the same against Ms Naranjo as it is against the respondent, relevant questions are; why was she not included in the original claim? What was known by the claimant and/or her solicitor about her potential as a relevant respondent at that time? What should have been known? When did the claimant and/or his solicitor realise that the respondents ought to be included? (all as per ***Foulds***). In my view the claimant (or her solicitor) must have known or should have known in March

2021 that Ms Naranjo was a relevant respondent. Caution or prudence would suggest that to best protect the claimant's claims she should have been added at that time. I do not agree that to have done so would have caused significant delay or additional cost. The email of 24 January 2022 sets out clearly the reason for seeking to add her at that time; concern about the prospects of recovery of any award against the respondent. In my view that of itself is not a reason to bring her in to the proceedings now, late as that would now be. The obvious prejudice to Ms Naranjo is that if she were to be brought in, she personally could be liable for compensation in a claim which she otherwise believed she had avoided by the passage of time. That would be a relevant factor weighing against the application. That all said, the reason why the application does not succeed is that there is no basis on which to say that Ms Naranjo is an employee of the respondent. Thus, there is no basis under section 110 for her to be held liable. With no such basis, the application to amend must fail.

27. The application to amend is therefore refused, and my order reflects my opinion.

28. The case will progress against the respondent.

Employment Judge: Russell Bradley
Date of Judgment: 16 June 2022
Entered in register: 17 June 2022
and copied to parties