THE INDUSTRIAL TRIBUNALS

CASE REF: 24513/19

CLAIMANT: **Grace Bryant**

RESPONDENT: **Nestle UK Ltd**

Preliminary Hearing
Amendment Application

The decision of the tribunal is that the claimant's application to amend her existing proceedings to include a claim for age discrimination is refused.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Hamill**

APPEARANCES:

The claimant was self-represented, appearing in person.

The respondent was represented by Miss Sarah Agnew of counsel, instructed by Eversheds Sutherland.

APPLICATION

1. The purpose of this Preliminary Hearing was to consider an application on the part of the claimant for an amendment to her current proceedings. These proceedings, which were issued on 23 October 2019, are for unfair dismissal. Specifically, the ET1 stated that the claimant is alleging unfair dismissal by way of unfair selection for redundancy with specific allegations that the redundancy itself was not genuine and that the redundancy process was not carried out in good faith. These specific claims were restated at case management on the 23rd of March 2020 when the case was listed for hearing.

2. In the original application to the tribunal (IT1) the claimant asserted that:

> "*In summer 2018 my manager, Kate Herdman sent me a PIP (performance improvement plan), without telling me I was being disciplined. When challenged about it, it was dropped, never to be mentioned again. I believe she was trying to get rid of me at that point but failed due to not following*

company procedure (disciplinary) and the subsequent redundancy was contrived to get me out of the company."

3. By way of an email to the tribunal on 11 August 2020 the claimant stated:

> *"I am writing to you to ask you if I can include Age discrimination into the claim, I have made against Nestle UK for unfair dismissal.*
>
> *When I made the claim of Unfair Dismissal last year, I had suspected I had been made redundant so that another much younger employee could work in the role I had been employed to do for Nestle. I had no written evidence to support that thought at that time, so in my ignorance, I did not include Age discrimination in the claim, as I didn't think it would hold up in a hearing without any documentation to support it.*
>
> *However, recently through the processes of respondent discovery and DSAR information I have received from Nestle, I now have evidence to support Age discrimination, and would therefore like to be able to add this into my claim against Nestle UK.*
>
> *I realise I am outside the timeframe for raising such matters, as Eversheds, the respondents solicitors, have informed me that any such application to add a new claim will, on the face of it, be well outside of the prescribed time limits for issuing complaints.*
>
> *I would therefore request that you consider the reason why I was unable to bring a claim of Age discrimination in the original claim against Nestle UK, and why outside the normal timeframe, I am only now able to present evidence to support Age discrimination, which is the basis for requesting an amendment to the original claim I made against the company."* (Tribunal's emphasis)

This Preliminary Hearing to consider the amendment application was scheduled at a case management hearing on the 25 September 2020.

EVIDENCE

4. The tribunal was referred to an agreed bundle of documents including the claim form, response, chains of correspondence and documents disclosed during the proceedings. The tribunal heard evidence from the Claimant.

RELEVANT LAW

5. The tribunal has the power to grant leave to amend a claim under Rule 25 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020.

Guidance on the way in which a tribunal's discretion is exercised in relation to amendments is set out in ***Selkent Bus Company v Moore 1996 ICR 836*** by Mr Justice Mummery:- *(paragraphs 22-24)*

> *"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 additions or substitution of other labels for facts already pleaded to, or, 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 statutory 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 provisions

(c) *The timing and manner of an 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 can be made at any time before, at, or 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, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result from adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

6. **Harvey on Industrial Relations and Employment Law,** Division PI.1.I.5, at paragraph 311.02 notes:-

"Whilst the matters to be taken into account may vary depending on the particular circumstances of each case, it is clear that these factors will often be taken into account. In ***Pontoon (Europe) Ltd Shinh UKEAT/0094/18*** *(4 October 2019 unreported) Lavender J observed that* ***Selkent*** *lays down 'relevant circumstances on a non-exhaustive basis'".*

Harvey further notes the decision in ***Abercrombie & Others v Aga Rangemaster Ltd [2013]***" which confirmed that "*Paragraph (5) of Mummery J's guidance in **Selkent** was not intended to prescribe a box-ticking exercise but was simply a discussion of the kinds of factors likely to be relevant when carrying out the balancing process to which he referred."*

7. The three categories of amendment are enumerated *(paragraph 311.03)*:-

> "*A distinction may be drawn between:-*
>
> *(1) Amendments which are merely designed to alter the basis of an existing claim but without purporting to raise a new distinct head of complaint.*
>
> *(2) Amendments which add or subject a new cause of action which is linked to or arises out of the same facts as the original claim.*
>
> (3) *Amendments which add or subject a wholly new claim or cause of action which is not connected to the original claim at all*."

8. The GB Court of Appeal in ***Abercrombie & Others v Aga Rangemaster Ltd at (2013) EWCA Civ 148*** considered the issue of whether an amendment is a 're-labelling' (Category 2) or a 'wholly new claim' (Category 3) and gave the following guidance:

> "… *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 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. (Paragraph 48)*
>
> *…*
>
> *… Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and a fortiori in a re-labelling case – justice does not require the same approach: NB that in High Court proceedings amendments to introduce "new claims" out of time are permissible where "the new cause of action arises out of the same facts or substantially the same facts as are already in issue" (Limitation Act 1980) Section 35(5))". (Paragraph 50)*

9. ***Harvey*** notes further: *(paragraph 311.09)*

> *"However although there may be an absence of a link between the case as pleaded in the original claim and the proposed amendment this will not be conclusive against the amendment being allowed. In **Evershed v New Star***

Asset Management UKEAT/0249/09, *Underhill J pointed out that it is no more than a factor, the weight to be given to it being a matter of judgement in each case (para 24). When considering whether to allow an amendment, an Employment Tribunal should analyse carefully the extent to which the amendment would extend the issues in the evidence".* (Tribunal's emphasis)

10. In ***Martin v Microgen Wealth Management Systems Limited UKEAT/0505/06*** Elias LJ stated:-

> *"The overriding objective requires, amongst other matters, that cases are dealt with expeditiously and in a way which saves expense; further delays would have been inconsistent with these objectives.*
>
> *… Obviously, later amendments will be permitted in an appropriate case, but the later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment". (Paragraph 29).*

11. The tribunal must have regard to the relevant time limits and if the claim is out of time, consider whether the time should be extended under the appropriate statutory provision. ***Harvey*** notes:

> "…*even though it is necessary for the tribunal to consider the time limits they are only 'a factor albeit an important and potentially decisive one', in the exercise of the overall discretion whether or not to grant leave to amend, which remains the relative injustice/hardship test". [as per* ***Harvey*** *312.07]*

12. In ***British Coal v Keeble*** **[1997] IRLR 336** the EAT confirmed that on the question of time limits and any extension of same, a tribunal would be assisted by the factors mentioned in Section 33 of the Limitation Act 1980, which deals with the exercise of discretion by the courts in personal injury cases. *"It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to:-*

> *(a) the length of and reasons for the delay;*
>
> *(b) the extent to which the cogency of the evidence is likely to be affected by the delay;*
>
> *(c) the extent to which the party sued had cooperated with any request for information;*
>
> *(d) the promptness with which the plaintiff acted once her or she knew of the facts giving rise to the cause of action; and*
>
> (e) *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action*."

13. The decision of amendment is one for the discretion of the Employment Tribunal and one which is based on the facts of each case. The paramount consideration in an amendment application is the relative injustice and hardship involved in refusing or granting an amendment.

FINDINGS OF FACT

14. The claimant gave the following evidence:-

- The claimant first formed a belief that she was the victim of age discrimination when she learnt that she was at risk of being made redundant by the respondent. This was in May 2019.

- At that time the claimant formed the view that it was the intention of the respondent to amalgamate two distinct geographical areas of business on the island of Ireland, specifically Northern Ireland and an area known as Zone 1 which extended from the border down to the midlands of the Republic of Ireland. The claimant was responsible for certain functions within NI. The claimant formed the view that this exercise was carried out in order that she would be replaced by a Miss Lund, a younger woman, who had previously been responsible for zone 1 but would, once the amalgamation was completed, absorb the claimant's role.

- From May 2019 the claimant remained firmly of the belief that this was a conspiracy against her by a number of unnamed individuals in order to remove her from the workplace and that it was an act of direct age discrimination.

- In the coming days and weeks she ventilated this belief to a number of colleagues.

- The claimant informed the tribunal that over this period and into June 2019, when the redundancy selection process began, she was in repeated contact with ACAS and informed them of her belief. She advised the tribunal that ACAS "assisted" her throughout this period. The claimant subsequently issued these proceedings on 23 October 2019.

- Nowhere in this application to the tribunal is there any reference to age discrimination or to the conspiracy in relation to an amalgamation of business areas on the island of Ireland.

- The claimant confirmed to the tribunal that before issuing her claim she was aware of the time-limit for bringing the claim of age discrimination and was aware that it might prejudice any such claim to delay issuing proceedings beyond that time-limit.

- The claimant did not raise the issue of age discrimination until after receiving discovery from the respondent in late June 2020 when, in a series of replies to a notice for particulars from the respondent, she stated that she believed that she was the victim of age discrimination.

15. The explanation given by the claimant for the delay in raising the allegation of age discrimination is that she believed that while she had formed the view that it was age discrimination, she did not have any evidence which could substantiate the allegation. She therefore made a deliberate and considered decision to withhold making the allegation as she believed that it would be dismissed due to lack of evidence. She maintained her belief that age discrimination was the cause of her

dismissal throughout the period from May 2019 up until she raised the matter in August 2020.

16. The tribunal has some concerns about the claimant's evidence. In terms of not issuing the proceedings the claimant has explained that this was because she thought she had no evidence and has called herself naive in failing to include that head of claim in her IT1 form. The claimant simultaneously maintains that she was unaware that it was necessary to bring a separate claim of discrimination, in whatever form, as she was of the view that a claim for unfair dismissal would act as an "umbrella" allowing her to bring any other claim in relation to her employment and its' termination under that heading. This concerns the tribunal, particularly given her repeated contacts with ACAS and the manner in which the ET1 application form to the tribunal is set out wherein she did not tick the box at section 7.1 marked "age discrimination".

THE RESPONDENTS' SUBMISSION

17. The respondent argues that this amendment application is a Category 3 amendment (as per Harvey – see above). The respondent asserts that this application introduces an entirely new cause of action which has been lodged outside the statutory time limit. The respondent's submissions in summary are:-

    a. That there is prejudice to the respondent in having to deal with what is, in effect, an entirely new set of allegations than those contained within the application to the tribunal and upon which it has been basing the structuring of its defence for the last year.

    b. In relation to the evidence of its witnesses, who will now have to turn their minds to decisions and proposals that were made in the context of the business as far back as 2017/2018, the respondent asserts that the quality of that evidence will have been degraded by the delay of more than one year from the alleged act of discrimination to the raising of this head of claim.

    c. It will further be prejudiced by the time and expense that will be required to prepare an entirely novel defence.

CONCLUSION

18. Adopting the approach set out in **Selkent**:

What is the nature of the amendment?

In applying the legal principles and in assessing all the particular circumstances of this case, including the relative balance of injustice in whether or not to allow the amendment, the tribunal is satisfied that the proposed amendment amounts to a new claim or cause of action not previously pleaded. In reaching this conclusion the tribunal takes into account the following:

- The application to the tribunal completed by the claimant in October 2019 makes absolutely no reference to a conspiracy in relation to an amalgamation of trading areas by the respondent. It does not allege that any

amalgamation was part of a plan in order to remove the claimant.

- Rather the original application to this tribunal that the claimant has pleaded since issuing proceedings and throughout case management until August 2020 was that another manager had been seeking to remove the claimant, had attempted to carry out a performance improvement process to try and achieve this end and, when that did not work, instituted the redundancy proceedings. Thereafter the claimant alleged that the redundancy process was effectively carried out in bad faith and further alleged that there was no redundancy situation.

- The tribunal finds that these are two entirely different and distinct scenarios. Therefore the tribunal concludes that this application for an amendment is not a re-labelling of an existing allegation, it is an entirely new allegation.

Applicability of statutory time limits

Having concluded that this is a new claim, the next issue is whether the new claim is out of time and, if so, whether the time limit for presentation should be extended. The tribunal finds that it is out of time and declines to extend the time limit for the following reasons:

- The claimant, an articulate and intelligent person, made a deliberate decision from May 2019 until August 2020 not to pursue a claim for age discrimination. She did so with the knowledge that she possessed the right to bring such a claim and with the knowledge that it was a head of claim that would require to be explicitly detailed in the application to the tribunal. She did so knowing that any delay beyond the statutory time-limit might prejudice her ability to bring such a claim and, further, that the longer she delayed the more prejudice she would suffer.

- The application was triggered by the provision, during the disclosure process, of a number of documents relating to a proposed business amalgamation. The claimant came into possession of the first of these documents on 27 June 2020.

- Despite having obtained the evidence that she had felt was necessary for her claim, knowing she was out of time to make such a claim and that any delay and continuing delay would increasingly prejudice her claim, she then did not alert the respondent for some weeks and did not alert the tribunal to her desire to make an application to amend until 11 August 2020. The tribunal did not receive a satisfactory explanation for this further delay.

The timing and manner of the Application.

- As noted above, the claimant deliberately chose to withhold her allegation of discrimination, something she is not entitled to do knowing or expecting that at some point in the future she might decide to bring such a claim.

- The tribunal time-limits are there to be observed and are for the benefit of all parties to ensure that matters are pleaded promptly and before the passage of time impacts upon the ability of parties to represent their interests.

- Particularly when a party has acted in a manner that has had the effect of disadvantaging another party the tribunal would not generally be minded to assist that party who has misled their opponent for tactical reasons. In the normal course of events a claim for such a substantial amendment might be accepted if a party had not delayed too long, or had done so unknowingly or had had a misapprehension of factual circumstances. None of those factors apply here.

- There can be and have been cases where parties were completely unaware that they had a cause of action until they came into possession of information or documentation at a later date and outside the time-limit which alerted them, for the first time, to such a possibility. In such circumstances extensions can and have been given. Again, this does not apply here.

- The claimant always had a clear belief that she was the victim of age discrimination, she was happy to ventilate this belief to co-workers, the tribunal has also seen that she has recorded it in contemporaneous notes that she made for her own use in June 2019 and she has told the tribunal that she ventilated this belief to ACAS. The claimant, in summary, deliberately chose to ignore the statutory time-limits.

- This decision has prejudiced the Respondent and, particularly given the substantial additional work which would be required and the additional evidence which would require to be heard, the balance of hardship which requires to be considered falls in favour of the respondent.

Therefore, taking into account all the factors set out above, the tribunal refuses the application to grant the extension requested by the claimant to bring a claim for age discrimination on the basis that it is an entirely new claim and it is out of time. The reasons she has given which (in terms) are that she deliberately decided to ignore the time limit and to decline to properly and fully set out her actual claim until she decided it was opportune to do so, are not appropriate or sustainable reasons for that delay and are not reasons that justify granting the proposed amendment.

FURTHER MATTERS

19. This claim will continue to be case managed to hearing as follows.

20. The parties have until **5.00 pm on 7 December 2020** to complete a mutual exchange of witness statements.

21. The parties are to liaise and agree a bundle of documents for the hearing. The respondent has agreed to provide three copies of the bundle for the benefit of the tribunal. The bundle will be no more than 400 pages. The index to the bundle is to be agreed between the parties **no later than 5.00 pm on 15 January 2021**.

22. There will be a further Preliminary Hearing (Progress Review) in this case at **11.00 am** on **Friday 29 January 2021** to be conducted by telephone. The purpose of this hearing will be to ensure that the matters set out above have been completed and that the case is ready for hearing. The hearing will then proceed to secure dates for a four day in person hearing in the case. The respondent indicated that

one or more of its witnesses may be required to attend by way of video conferencing as they live in England. At that hearing on **29 January 2021**, consideration will be given to the practicalities of a hearing conducted in that manner.

Employment Judge: 

Date and place of hearing: **9 November 2020, Belfast.**

This judgment was entered in the register and issued to the parties on: