EMPLOYMENT TRIBUNALS

Claimant: **Mr B Sani**

Respondents: **(1) Cardiff and Vale University Local Health Board**
(2) West Midlands Ambulance Service University NHS Foundation Trust

Heard at: **By video** **On: 8 December 2021**

Before: **Employment Judge S Moore**

Representation:

Claimant:	In person
First Respondent:	Ms S Clarke, Counsel
Second Respondent:	Did not attend
Interpreter:	Ms Ana Probert

ORDERS FROM A PRELIMINARY HEARING

1. The claimant's application to amend his claim is refused.

REASONS

2. This preliminary hearing was listed today to consider the claimant's application to amend.

3. There have been three previous preliminary hearings to case manage this claim. The claimant has already had permission to amend his claim granted by Judge Brace on 22 January 2021. The claims permitted by way of amendment were produced in the case management order of the same date. The claimant was ordered to provide further information about the amended claims by 19 February 2021. He did so on 4 March 2021. He did not raise any issues regarding the list of claims in the case management order nor did he suggest that it had missed

one of his complaints. His further and better particulars did not mention the claims now sought to be added by amendment.

4. At the last hearing before Judge Howden-Evans, the claimant asserted that there was a victimisation allegation missing in Judge Brace's order regarding alleged conduct of his line manager in July 2019. Judge Howden Evans gave permission for the claimant to make a further application to amend his claim (see paragraphs 11 – 16 of the order dated 23 July 2021).

5. The claimant duly made an application to add an allegation to his victimisation claim in an email dated 17 August 2021. In that email he also stated:

"From the conversations I got with employment advisor, he told me that the resignation from my job that constitutes as "CONSTRUCTION DISMISSAL" (sic). Please, can you check that?"

6. The first respondent objected to this application to amend by their email dated 7 September 2021. This led to the listing of this hearing today. The extent of the particulars of the constructive unfair dismissal claim is as set out in paragraph 5.

7. I gave the claimant the opportunity to make submissions as to why the application to amend should be granted. The claimant advised he wished to rely on his previous communications to the Tribunal. There was an email on the file dated 15 September 2021 in which the claimant explained he was not a professional employment advisor and is being advised differently every time he sees a different advisor. He also referenced evidence to support his victimisation claim being a text message form the claimant to the line manager in which he states he had been told by someone called Darren that the line manager wanted to speak to him. The claimant also stated there was a long time before the hearing adding the claim would not cause extra work time or costs.

8. After hearing the respondent's submissions the claimant was permitted to address the Tribunal further. He reiterated that he had been given differing advice and explained he had difficulty in accessing advice due to Covid.

9. In reaching my decision on the amendment application I have had regard to **Selkent Bus Co Ltd v Moore 1996 ICR 836** in which the EAT sets out guidance for Tribunals when considering amendments. In deciding whether to exercise discretion to grant leave for amendment of an originating application, a 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. Relevant circumstances include:

(a) The nature of the amendment, i.e. whether the amendment sought is a minor matter such as the correction of clerical and typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels for facts already pleaded to, or, on the other hand, whether it is a substantial alteration making entirely new factual allegations which change the basis of the existing claim.

(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 the application. Although the tribunal rules do not lay down any time limit for the making of amendments, and an application should not be refused solely because there has been a delay in making it, it is relevant to consider why the application was not made earlier. An application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then and not earlier, particularly where the new facts alleged must have been within the knowledge of the applicant at the time the originating application was presented.

10. Applying those principles my conclusions are as follows.

11. In relation to the nature of the amendments. The claimant already has a victimisation claim however this is a new factual allegation. As such it is a new claim and not a relabelling of existing matters already pleaded. In relation to the unfair dismissal claim it is an entirely new cause of action.

12. Regarding the applicability of time limits. Both claims are substantially out of time. The primary limitation date for the victimsation claim was October 2019 (we do not know the exact date of the alleged act). The primary limitation date for the unfair dismissal claim was 8 September 2020.

13. As to the timing and manner of the application. The claimant has already had the opportunity to amend his claim once. These new amendments were not advanced at that point. The claimant had the benefit of ELIPs representation at the November 2019 hearing yet still, the victimisation claim was not mentioned. I therefore consider that the claimant's explanation about differing advice to not be helpful in respect of this amendment. The claimant did not raise any issues regarding Judge Brace's list of issues between January and July 2021 and did not advance the claim in his further and better partiuclars.

14. The manner of the application to add the unfair dismissal claim is of particular concern. There are no particulars of claim. Even now, the respondent cannot reasonably understand the basis of the claim. If the claim was allowed it would require further particulars.

15. I consider the claimant has had ample opportunity to set out his claim. It is not for the Tribunal or Judges to plead the case for the claimant. A number of preliminary hearings have taken place where the Tribunal has sought to clarify the issues. I am not satisfied that the explanation regarding different advisors and the impact of Covid weighs the balance of prejudice in favour of the claimant. The claimant had access to an ELIPS clinic and since Covid, has on a number of occasions been directed to the sources of advice leaflet which contains details of advisors operating online advice clinics. In any event, even if a claimant is a litigant in person, there must at some point be finality and the respondent must be entitled to know the claims they are facing without them being ever moveable.

16. Lastly, in relation to the balance of prejudice. The evidence the claimant references does not in any way give rise to an inference of discrimination. It is a

text message form the claimant to his supervisor stating he has asked to see him. That could be about any subject at all. These events, if permitted to be added would have taken place almost three years previously and the respondent would be required to open a new line of enquiry, gather new witness evidence and possible documents. The same can be said for the constructive dismissal claim. Although the dismissal was 2 years ago, the respondent could not begin to prepare to defend this claim as they do not know why the claimant says he was constructively dismissed or what the breach of contract is said to be.

17. The Hearing is listed to commence on 28 March 2022. Allowing the amendment would mean a postponement of the hearing. These allegations are already three years old. I consider the balance of prejudice lies with the respondent having regard to further delays in reaching a final hearing.

18. For these reasons the application is refused.

19. The claimant commented that the hearing due to start on 28 March 2022 was "provisional". I explained to the claimant this is not the case. The hearing has been confirmed both in Judge Howden-Evans order and a notice of hearing, both of which have been sent to the claimant. I direct that the notice of hearing is sent with this order, for the avoidance of any doubt, that hearing is listed and shall proceed unless there are circumstances which would justify a postponement.

20. I direct that if not already listed, a "catch up" telephone hearing be listed two weeks before 28 March 2022 to ensure the parties are ready to proceed.

_____

Employment Judge S Moore
Dated: 8 December 2021

ORDER SENT TO THE PARTIES ON 9 December 2021

.....
FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS Mr N Roche