EMPLOYMENT TRIBUNALS

Claimant: **Miss K Pearce**

Respondent: **Barking, Havering and Redbridge University Hospitals NHS Trust**

Heard at: **East London Hearing Centre**

On: **12 July 2021**

Before: **Employment Judge Russell**

Representation
Claimant: **In person**
Respondent: **Ms J Blackburn (Solicitor)**

An **ORDER** refusing leave to amend the claim form having been made with oral reasons given at the hearing, written having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The Claimant was employed by the Respondent as an Antenatal Education Midwife from 16 January 2017 until the expiry of her notice period on 24 December 2020, following her resignation on 1 October 2020.

2 The Claimant presented her claim to the Employment Tribunal on 31 December 2020. She ticked box 8 to indicate a claim of unfair dismissal (including constructive dismissal), disability discrimination and, under the box for making another type of claim, wrote "**bullying, harassment, victimisation and gaslighting**". The Claimant also ticked box 10.1 where claimants are asked if they would like their complaint to a relevant regulator if they are making a protected disclosure complaint. The pro forma ET1 does not include a separate box for protected disclosure complaints. There are limits on the amount of information which can be included for submission on-line. Nevertheless, the Claimant was able to set out in significant detail the factual basis of her claim in boxes 8.2 and 15. Even on a careful reading, the information contains no reference to a whistle-blowing complaint and the claims made are listed as "**constructive dismissal, discrimination, disability, victimisation, gaslighting and bullying and harassment**".

3 The Claimant was required to provide further information of her disability and

discrimination claims. She did so by way of a 23-page document setting out 47 detriments between 4 October 2017 and 27 November 2020. The bullet point list of complaints and the description of each of the detriments do not refer to whistle-blowing.

4 In her draft list of issues sent on 25 June 2021 in preparation for this hearing, the Claimant referred for the first time to a protected disclosure claim. The draft list suggests that the protected disclosure was made on 26 January 2019 and 30 January 2019 and that the Claimant disclosed information about patient care failings during a birth at which she assisted in which a verbal ventouse procedure was performed and medication administered without being properly documented. This incident is referred to in the further information but described as discrimination, bullying and victimisation.

5 The Respondent produced a draft List of Issues based upon the contents of the claim form and further information. It asked for further information about the protected acts relied upon in the victimisation claim and did not include a whistle-blowing claim at all. In response the Claimant sent an email on 2 July 2021 asking the Respondent to include the whistle-blowing claim as she had "ticked the box" and made reference to it in her claim form. The Respondent did not agree.

6 Today, the Claimant asked me to include the whistle-blowing detriment and/or dismissal claims in the list of issues either because they are already pleaded (she believes that they are included in the constructive dismissal and/or harassment claims although she now accepts that it was not expressly included in the claim form) or by way of amendment. The Claimant relies upon 10 alleged protected disclosures set out in the draft list of issues under the heading of victimisation; some are said to be repeats of earlier information about the incident on 26 January 2019, others relate to the Claimant's complaints later in 2019 and 2020 about her own employment (issues about adherence to the uniform policy and breakdown in the relationship with her line manager). The detriments are said to be included in the harassment and/or victimisation claims. The Respondent resisted the inclusion of any whistle-blowing claim.

7 Looking at the details set out in the Claimant's original claim form, there is no reference to the patient incident on 26 January 2019, to any concern raised by the Claimant at the time or any suggestion that it was the cause of the treatment about which the Claimant did complain. Nor does the claim form plead that the Claimant repeated her expressions about this incident or any others. On balance, I accept Ms Blackburn's submission that this is a substantial amendment raising entirely new factual and legal issues for the Tribunal if it is allowed.

8 In considering the application for leave to amend, I applied the guidance and approach set out in **Vaughan v Modality Partnership** UKEAT 0147 20 BA and the summary there of the well-known authorities on amendment, **Cocking**, **Selkent**, **Abercrombie** and **Safeway**.

9 I reminded myself that the starting point is to consider the real practical consequences of allowing or refusing an amendment and in particular in balancing the hardship between the parties. The Tribunal must consider the practical importance of the amendment. The real question is not whether refusal prevents the party from

getting what they want, rather whether they will be prevented from getting what they need. The balancing exercise requires consideration to the injustice to both sides in allowing or refusing both quantitively and qualitatively. Maintenance of discipline in Tribunal proceedings and avoiding unnecessary expense are relevant considerations but the key factor remains the balance of justice. Relevant factors to consider will include whether or not the application proposed is minor or substantial, the application of time limits and the timing and manner of the application.

10 On the Claimant's side, I accept that if I were to refuse the amendment, she is deprived of the ability of bringing a freestanding protected disclosure claim. However, she is not deprived of access to a fair hearing of her complaints as she has existing claims of harassment, discrimination and victimisation before the Tribunal. The Claimant's case is already lengthy and discursive with many of the same detriments relied upon. The amendment is not needed to advance these existing claims. If allowed to proceed as protected disclosure claims in addition, however, there would be added legal complexity as to what information was disclosed, whether there was reasonable belief in a relevant breach and the public interest insofar as the information related to her own employment, as well as causation issues.

11 Moreover, there would be significant issues about time limits. The Claimant resigned on 1 October 2020 and her employment terminated on 24 December 2020. ACAS early conciliation started and ended on 2 December 2020. The Claimant was able to present her claim in time on 31 December 2020 but the protected disclosure claim was only raised by way of the draft list of issues on 25 June 2021. The detriments date back to 2019 and the Tribunal would need to consider for any found to be material caused by a protected disclosure they were part of a continuing course of conduct and/or whether it was not reasonably practicable to have presented them in time. For all of these reasons, the prejudice to the Claimant of refusing the amendment is minimal.

12 By contrast, I am satisfied that there would be significant prejudice to the Respondent if I were to allow the amendment. This is a case which is already sorely lacking in focus. The Claimant alleges 52 separate incidents of conduct as matters entitling her to resign and claim constructive dismissal and as detriments or acts of harassment. To add a further 10 alleged protected disclosures and to then consider which, if any, was a material cause of any detriment which is found to have occurred will lead to a very significant expansion of the scope of the evidential and legal enquiry required in the case, with a consequential increase in the time estimate for the final hearing. The time estimate for the pleaded case is 10 days, to add the protected disclosure claims would add a further five days. This would cause considerable additional financial cost for all parties and I bear in mind that the Respondent is publicly funded with limited financial resources.

13 Allowing the amendment would also cause considerable significant delay. At the moment pressure on judicial resources in this region means that case are not being listed until well into 2022. If this claim were to be allowed to proceed with the protected disclosure claim included, it is likely that this case could not be listed until well into 2023. There are many other cases waiting to be heard in the Employment Tribunal and the Tribunal has a duty to comply with the overriding objective to ensure access to justice in a timely manner for all.

14 For all of these reasons I am satisfied that the real practical consequences of allowing the amendment would cause considerable prejudice to the Respondent which outweighs the minimal hardship and injustice to the Claimant in refusing the amendment to let her bring the claim that she now wants to advance.

15 These reasons were given orally to the parties at the hearing in July 2021. By email sent on 28 July 2021, the Claimant asked for written confirmation of the reasons in order to understand the decision I reached. As set out in my Summary of the Preliminary Hearing on 7 June 2022, due to an administrative oversight the written reasons were not provided. I apologised to the Claimant at that hearing and take the opportunity to do so again. For the avoidance of doubt, the initial request for written reasons was made in time; the delay is not the fault of the Claimant in any way.

Employment Judge Russell
Date: 21 June 2022