How representatives should best prepare for an application to amend: Mrs G Vaughan Modality Partnership UKEAT/0147/20/BA

By Andrew MacPhail
3PB Barristers

The ET

C brought claims for whistleblowing detriment and dismissal (s47B ERA 1996 and s103A ERA 1996). A PH occurred, following which C provided further particulars and the matter was listed for a four- day final hearing.

Day one of the final hearing duly arrived; unfortunately, it transpired that no wing members were available that day. As such the final hearing had to be postponed. At that juncture C made an application to amend her claim to add two additional alleged protected disclosures.

The two new alleged protected disclosures had not appeared in C's pleaded case; however, they had been included in her witness statement, which had been duly exchanged in advance of the final hearing.

The ET refused C's application.

The EAT

C appealed on various grounds, including that the ET had failed to carry out the necessary balancing exercise. C argued that whereas the ET had considered the prejudice to R if the application was permitted, the ET had failed to consider the hardship or injustice which would be suffered by C if the application was refused.

This was perhaps a surprising ground of appeal, given that at the time of making the application to amend C had not in fact pointed the ET to any such hardship or injustice.

The EAT took the view that the ET had in fact considered the question of prejudice from both sides, despite C's failure to point to any prejudice at the time. Given that the ET had undertaken the necessary balancing exercise, the appeal ground was rejected.

C argued other grounds, but they seem to have received short shrift. By way of example,

- C pointed to the fact that the two protected disclosures had appeared in her witness statement and that R had not objected at point of exchange. The EAT pointed out that a witness statement is not an application to amend and it was as such not incumbent on R to raise an objection at that point.

- C argued that late disclosure by R had given rise to the two additional protected disclosures. However, this was not a matter which C had raised with the ET; and in any event the EAT was unimpressed, pointing out that C must herself have been aware of any protected disclosures she had made, without the need for sight of disclosure from R.

Guidance from the EAT

In giving judgment, the EAT took the opportunity to caution practitioners against treading the well-worn trail of listing the *Selkent* factors as if they constituted a tick box exercise:

> *"Representatives often erroneously structure their submissions for applications to amend as if the Selkent factors were a checklist, without any or sufficient focus on the balance of hardship and injustice."*

The EAT encouraged practitioners to focus on the practical consequences of granting (or refusing) an application to amend:

> *"Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions."*

All refusals entail disallowing the claimant from pursuing a particular claim (or a particular element of a claim. As such those representing claimants should consider why the particular amendment sought is of importance:

> *"Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence."*

Although this is welcome guidance, the EAT was careful to point out the inherent risks of highlighting the relevant prejudice:

> *"This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later."*

Respondent representatives will want to bear in mind the following potential practical consequence:

> *"A late amendment may cause prejudice to the respondent because it is more difficult to respond to ….."*

However, the EAT made clear that submissions on the point should be made on specific instructions:

> *"It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition."*

Representatives may also want to consider the claimant's means, and the consequential ability or inability to pay for any additional costs arising from the late amendment:

> "Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.

Comment

The EAT has provided some welcome guidance on how representatives should best prepare for an application to amend.

Of particular interest is the encouragement given to claimant representatives to move away from simply pointing to the prejudice inherent in not being permitted to pursue a particular claim and to focus instead on why the particular claim/amendment is needed.

It is not unusual for the need for amendment to arise out of a rushed/poor pleading of an ET1. It remains to be seen how willing claimant representatives will be to explain the need for amendment by putting a spotlight on, or even acknowledging, the deficiencies of the original pleading.

Taking such an approach will no doubt be all the more awkward where it transpires that the original ET1 pleading was drafted by the advocate making the application to amend.

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Andrew MacPhail
Barrister
3PB Barristers
0330 332 2633
Andrew.macphail@3pb.co.uk
3pb.co.uk