Appeal No. UKEATS/0049/13/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 6 March 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR JAMES THOMSON — APPELLANT

(1) EAST DUNBARTONSHIRE COUNCIL
(2) EAST DUNBARTONSHIRE ENTERPRISE TRUST LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES THOMSON (The Appellant in Person)
For the First Respondent	MS JENNIFER BURNS (Solicitor) East Dunbartonshire Council Broomhill Industrial Estate Kilsyth Road Kirkintilloch G66 1TF.

SUMMARY

PRACTICE AND PROCEDURE – Amendment

C remained employed by the transferor of part of an undertaking, in which both he and the transferor said he worked so much as to be assigned to it, after that part was transferred to a transferee employer. He accepted in writing and orally, though not always consistently, that he had not complained to the ET that the transferee's refusal to accept him as an employee was a dismissal by it. He filed his ET1 asking for compensation in respect of the transfer, because he thought himself at risk of redundancy. Those fears proved justified: he was made redundant by the transferor some 6 months after the transfer. He did not take a number of opportunities to clarify to what his claim for compensation related, despite being asked by R to particularise it; at 3 successive CMDs it was identified as being in respect of a failure to consult. After the second of those, C filed an ET1 claiming dismissal by the transferee. It was not until some 5 months after this that he sought to amend his existing claim to add a complaint of dismissal, arguing that it was intrinsic to his existing claim, and arose out of the same facts. An EJ refused the amendment, on the basis of the principles in **Selkent v Moore**. C argued that the discretion was flawed in law, in part because the EJ had applied a "balance of prejudice" test whereas Mummery J had referred in **Selkent** to balancing "injustice and hardship",

Held: The Judge directed himself appropriately, and did not take into account any irrelevant factor or leave out of account any relevant one. There was meaningful difference between "prejudice" on the one hand and "injustice and hardship" on the other. Appeal dismissed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. At a Pre-Hearing Review on 23 May 2013, Employment Judge d'Inverno refused the Claimant leave to amend his originating application. The principles in relation to the grant or refusal of an amendment are well understood. The decision is discretionary. As with any exercise of discretion, there is a wide margin within which a Judge can legitimately make his decision. That is of the essence of a choice which may be freely made. But a decision to exercise a discretion must be made judicially, that is with regard to relevance, reason, fairness and justice. The principles applicable in the specific context of the grant or refusal of an amendment were considered in the case of **Selkent Bus Co Ltd v Moore** [1996] ICR 836. Those principles have since been affirmed as appropriate by the Court of Appeal, for instance in **Hammersmith and Fulham London Borough Council v Jesuthasan** [1998] ICR 640. The principles are set out at page 842F to 844C of the Judgment in **Selkent**. Those relevant for the present appeal are No 4 and No 5.

> **"(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account *all t*he circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.**
>
> **(5) 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 additions 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 provisions e.g., in the case of unfair dismissal** [the reference then made to what is now s.111 of the Employment Rights Act 1996]**.**
>
> **(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 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."

2. Those passages highlight particular factors. It is well understood that the exercise of a discretion can only be upset on appeal if there is an error of law. That will be where the Judge has taken something into account which he should not have done, has left something out of account which he should have taken into account, or reached a decision which is wholly unreasonable such that no reasonable Judge could have reached it: in effect, the latter is to argue that the discretion could, in the circumstances, have been exercised only in one direction. It represents, inevitably, a very high hurdle and is, in effect an allegation of perversity.

3. The circumstances which gave rise to the exercise of a discretion by Judge d'Inverno in the current case are these. The Claimant worked for a substantial period of time as a Finance Manager for East Dunbartonshire Development Company, becoming East Dunbartonshire Enterprise Trust Limited ("EDET"). The work which EDET did for East Dunbartonshire Council was acquired by that Council (EDC). With effect from 1 April 2012 EDC moved that work in-house. In doing so, therefore, a number of staff who had worked for EDET in the undertaking or part of the undertaking transferred became employees of EDC. EDC accepted that seven out of the nine employees said by EDET to be working in that part of the undertaking which was being transferred were assigned to it. EDC therefore accepted those employees as transferred under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (TUPE). EDC, however, declined to accept that either the Claimant or his assistant, a Ms Webb, were assigned to the part of the undertaking transferred. They declined, therefore, to recognise the Claimant as an employee. He was concerned at the position in which this left him. He anticipated, and as it happened events have proved him

right, that he would be made redundant from the end of September that same year, because once the undertaking had been transferred, in which he had worked, he said, there would be little or no work for him left to do for EDET.

4. One of the difficulties for him was that he remained in employment with EDET upon identical terms and conditions to those he had enjoyed before. Although EDET argued that he should have been transferred, they accepted him as continuing in employment, and it appears he was content to accept that employment as continuing rather than raise any more direct a challenge to what had happened than I shall now describe.

5. In June 2012, therefore within three months of 1 April, he issued an ET1. That ET1 said, on the face of it, that his employment was continuing. That assertion was supported by his reference to potential redundancy on 30 September. In box 5, he could have ticked the box saying that he was unfairly dismissed. He brought the ET1 against EDC as well as EDET. He did not say that he had been unfairly dismissed. He ticked, rather, the box headed "Other complaints" and in box 6 said that he sought monetary compensation. The basis for his claim for compensation for not being transferred to EDC was made in these terms:

> **"My claim is that I should be compensated by EDC for their decision not to accept my transfer under TUPE."**

6. Anyone looking at that claim might be forgiven for understanding that what was not being alleged was any form of dismissal. Instead there was an unspecified claim to compensation. Scrutiny of the Regulations of 2006 do not make it easy to identify what that compensation might be. Neither a claim under Regulation 7 (dismissal because of a relevant transfer) or as a consequence of the application of Regulation 4 (the assertion there being that the contract had transferred but notionally he was immediately dismissed by the transferee)

would have been apparent. Indeed they would appear to be excluded by the terms of the ET1. A remedy for failure to inform or consult might be available under Regulation 15, but there was nothing clearly on the face of the ET1 which addressed whether that was the basis for the claim.

7. The Claimant was subsequently, on 5 March 2013, to write in the application to amend, which came before Judge d'Inverno, that the ET1 was made with a view to preserving his position. He accepted that at one of the three CMDs which followed (they were respectively on 7 November 2012, 17 December 2012, 7 February 2013) it was "rightly pointed out" that his application did not seek a finding of unfair dismissal - it was an application in respect of other complaints - and the view was expressed at the December CMD that it could only be a complaint in respect of a failure to inform and consult. Since then, observed the Claimant, the application had proceeded on that basis.

8. That fits with what was said to the Judge who presided over the three CMDs, Employment Judge Jane Garvie. At paragraph 5 of a note following the November CMD she noted that there seemed to be no dispute that the Claimant's employment was not actually transferred from EDET to EDC, although EDET maintained that it should have been. At the December CMD, the Judge noted, paragraph 9, that the claims had been "registered in relation to alleged failure to consult the Claimants" and, at paragraphs 20 and 21, said in each that the claims had been brought in relation to the alleged failure to consult the Claimants. The CMD discussion makes it clear (see paragraph 6) that both the Claimant and Ms Webb, whose cases had by now been conjoined, had been asked by the Judge about the basis for their claims.

9. In December 2012, following that second CMD, the Claimant issued a separate claim, case no. 4100047/2013. That did assert unfair dismissal arising out of essentially the same facts, and it was lodged because the Claimant appreciated that his existing claim did not

expressly claim unfair dismissal and was instead proceeding upon the basis that it asserted a failure to inform and consult.

10. The February CMD confirmed that the Claimants maintained there had been a failure to consult (see paragraph 5 of the note following that CMD). It may be material that in paragraph 9 it was said that the First Claimant asserted that there was both a failure to consult him and the Second Claimant but that in addition it was their joint position that they should have been transferred from the Second Respondent's employment to the First Respondent's employment. She drew attention to the position in law in respect of that second assertion (see paragraphs 24 and 25). The issue which she thought was raised was whether there was a relevant transfer, and both First and Second Claimants had been sufficiently assigned to the part transferred, and whether there had been a failure to consult in that respect. But also of note was a record that even by this stage, after two CMDs, this now being the third, Ms Burns, who appeared for EDC, as she does before me, said that she was unclear as to the basis of the claims. That lack of clarity had been pointed out by the EDC in its Response to the initial claim. In that, in a paper apart, Miss Habib, for EDC, said that the complaint seeking compensation (paragraph 20) was wholly lacking in specificity:

> **"The Claimant is called upon to produce further and better particulars of his complaint. His failure to do so will be founded upon."**

Her paper observed that, if the Claimant failed to state a further detailed claim articulating the facts and intention on which he intended to rely, his claim would be regarded as misconceived and might be struck out.

11. In response to that, the Claimant did indeed file Further and Better Particulars, but they did not answer the question posed by the ET3. Instead, they substantially dealt with the

question whether or not the Claimant was assigned to that part of the undertaking which had been transferred. It said nothing which would have illuminated the basis upon which he was seeking compensation.

12. When the matter was considered by the Claimant, following the third CMD, he wrote the letter of 5 March 2013, to which I have already referred. It was that which came before Judge d'Inverno.

The Tribunal decision

13. The Judge directed himself in accordance with **Selkent**. There is no dispute, save in respect of one matter, that he directed himself in law correctly. That one matter is that he referred to "the balance of prejudice" whereas Mummery J had referred to "relative injustice and hardship". It seems to me that the balance of prejudice, essentially, is intended to convey the same concept. It may perhaps be helpful to return to the words used by Mummery J in future considerations of a case such as this, though frequently "balance of prejudice" is the lawyers' shorthand for the necessary exercise, purely because it may focus more closely on the two separate questions: injustice on the one hand, hardship on the other. But balance of prejudice is capable of including matters which might not strictly be described as unjust or hard but may nonetheless be relevant. All the circumstances have of course to be taken into account. I do not see using this phrase as an error of law in the Judge's approach. In my view, he correctly approached the exercise of his discretion.

14. He took into account, in exercising his discretion, first at paragraph 4, that what the Claimant sought to do was not as he contended simply a re-labelling exercise. He said that:

> **"While it is true that the new claim could, in general terms, be seen to arise out of the same factual matrix, to say that it was in truth the same claim merely mislabelled as currently**

presented in the ET1, is not accurate and indeed is contrary to the oral and written submissions made by the claimant in which he made clear that...he had consciously not presented and had not given notice of a complaint of unfair dismissal."

15. That is entirely consistent with the letter of 5 March and my reading of the papers. The Claimant had deliberately not described himself as unfairly dismissed. Accordingly, it seems to me the Judge was correct to recognise, first, that in general terms the amendment did arise out of the same factual matrix, but it was, secondly, a new claim. He examined the claim as it had been put and set out, at paragraph 4.3, that the Claimant said that he had become aware of his error in not asserting unfair dismissal on or about 7 November 2012 at the latest and noted that there was no explanation apart from the fact he had begun his separate claim why he then delayed until 5 March seeking leave to amend. Next, he took into account the fact the claim was presented long outwith the three-month time limit for unfair dismissal claims.

16. Accordingly the Judge had set out at length the underlying facts, the "all the circumstances of the case" to which **Selkent** refers; he had considered the nature of the amendment and reached a permissible view; he had looked at the applicability of time limits; and he had considered the timing and manner of the application, though Mr Thomson points out, correctly, that that latter is not decisive. It is nonetheless relevant as telling towards the discretion, and the Judge took that into account and was not therefore wrong, in my view, in doing so. Plainly at 4.5 he applied the test of the balance of prejudice as an overall test. As to that, he noted that to refuse the amendment would have the advantage that the case, in common with that of Ms Webb, could proceed to a hearing. What he was saying was that if he had allowed the amendment that might have to be adjourned. That is relevant, as indeed again **Selkent** recognises. On the other hand, looking at the prejudice to the Claimant, he noted that there was no significant prejudice because the Claimant had already begun a claim in December in respect of unfair dismissal. This might have been open to the observation that the Judge had

not properly weighed in the balance the fact that there is no time limit specific to amendment though there is for making a claim in the first place. But the Judge did consider that, in lines 31 and following on page 13 of his judgment at the end of paragraph 4.5, and indeed noted that he was in a "less worse position" than in the current action since, inevitably, applying **Selkent**, he would have to take into account why it was that the claim was late and whether the ordinary time limits had been exceeded.

The appeal

17. The Claimant submitted that the Employment Tribunal made a decision so wrong that no reasonable Employment Tribunal, properly directing itself, could have made it on the material before it. He argued in support of that that the Second Respondent, that was EDET, did not object to the application to amend. That, it seems to me, is irrelevant as to whether the amendment should have been allowed against the First Respondent, who was the principal protagonist.

18. He addressed this ground, which is essentially perversity, in written submissions before me. He spoke in answer to the questions from the Bench and to top up those submissions, which otherwise were full and complete.

19. The first and large part of those submissions set out the way in which he contended the claim should have been understood. Because there was no reasonable case that he might succeed on a claim in respect of failure to inform or consult, not being an employee of the transferee against whom he was claiming, the only sensible way to construe the ET1 was to regard it as a complaint of unfair dismissal. The error was the minor one, as might have been obvious to anyone thinking of it, of failing to tick the box to say that he was alleging unfair dismissal. To support that, he argued that the response of EDC had in part recognised that his

claim might be a claim brought under Regulation 7 and therefore was either recognising that his claim was indeed for unfair dismissal or was simply not prejudiced by any change of label.

20. All that, it seems to me, however does not take away from the central fact that Judge d'Inverno was faced with the Claimant's own application for amendment. The Claimant himself had concluded it was necessary. He said that he recognised his claim did not include a claim for unfair dismissal and therefore the Judge was fully entitled to proceed on the basis that this was an amendment and not simply a claim which was already covered by the ET1.

21. In the seventh to ninth pages of his written submissions, he argued that the Judge went wrong because he had not recognised that it was re-labelling of the claim, that he should not be prejudiced by association with the claim of Ms Webb and that he should not be affected by the delay in applying to amend until 5 March 2013 despite having become aware of it, on what the Judge indicated he had said to him, from 7 November 2012, some four months beforehand. He argued that the test was wrong, a matter which I have already dealt with, where it spoke of balance of prejudice rather than "relative injustice and hardship". He spoke of letting the existing case proceed without realising that, in effect, there was no point, so far as the Claimant was concerned, because his claim would not succeed; that the Judge did not recognise the difficulty in establishing the Case Management Judge's directions. He had not applied the overriding objective and he had reached a decision which was so wrong as, in effect, to be perverse.

22. For all the reasons which I have set out, the Judge's exercise of his discretion applied the correct principles. There is no factor which it is said he left out of account which legally he was obliged to take into account. And, given there was an application for an amendment, the very nature of which presupposes that it might be determined one way or the other, it is impossible

sensibly to say that a decision against the Claimant was perverse. That said, part of the logic which persuaded Judge d'Inverno to his conclusion rested upon the fact that the Claimant had a claim, albeit subject to arguments about time bar. I gather that the claim is presently sisted. The Judge did not consider joining that claim to the present and determining the issue of time. Had he done so, he might well have wished to reflect upon the highly arguable issues thrown up by the underlying factual and legal position in the present case. Where an employee who should be transferred, on the basis that he is actually assigned to that part of the undertaking which is transferred, is not accepted as an employee by the transferee and remains working, as if nothing changed, in the employment of the transferor, the conceptual analysis of that passage of events in terms of transfer, dismissal and re-employment is bound to seem highly artificial to any lay applicant. As Mr Thomson himself put it, in his written argument:

> **"The idea that I had been dismissed by an organisation with whom I had never been employed and who had never paid me did not, as a lay person, even remotely occur to me. Even now, I struggle with the concept.**

23. It may that one view of the great difficulties that the Employment Judge had at the CMDs in understanding what the claim was about arose from these very same conceptual difficulties. If so, that might be a highly relevant factor to take into account in determining whether or not it was not reasonably practicable to bring the claim which was brought in December within three months of the time it should have been brought and within a reasonable time thereafter.

24. I do not envy the task of the Tribunal in determining that question, the task before it, because it does not seem to me that it is necessarily open and shut. I am not concerned here, in this appeal, with the way in which I might have exercised the discretion had I been in the position of Judge d'Inverno. On the material before him, and with those final observations that I have just made in case they are of assistance to the parties hereafter, though otherwise they are entirely besides the main thrust of this judgment, this appeal is dismissed, as it has to be since

there is no error of law in the exercise of the Judge's discretion to refuse this particular amendment in these particular circumstances.