



EMPLOYMENT TRIBUNALS

Claimants

Mr G Adams & Others

v

Respondent

Maritime Transport Ltd

PRELIMINARY HEARING

Heard at: Bury St Edmunds

On: 5 October 2017

Before: Employment Judge Laidler

Appearances:

For the Claimants: Miss C Urquhart, Counsel.

For the Respondent: Mr E Kemp, Counsel.

JUDGMENT

Application by the claimants to amend

- 1. The applications made on behalf of Messrs Ansell, Adams, Beales and Bell are refused.**
- 2. The application made on behalf of Mr Luff is granted.**

CASE MANAGEMENT DISCUSSION SUMMARY

1. This matter was last before this Judge on 2 September 2016. Mr Kemp provided a note for this hearing which was discussed in detail throughout it. From that he noted and it is recorded that there have been multiple proceedings in respect of holiday pay and claims under s.145B TULR(C)A 1992 as follows:-
 - a) Mr B Wentworth-Wood & Others v Maritime Transport Limited (Case Numbers 3401550/2014 to 3401577/2014) ("First Claim");

Case Number: 3401709/2015 & Others

- b) Mr R Allday & Others v Maritime Transport Limited (Case Numbers 3400497/2015 to 3400499/2015) (“Second Claim”);
 - c) Mr G Adams & Others v Maritime Transport Limited (Case Numbers 3400585/2015 to 3400608/2015) (“Third Claim”) (duplicate holiday pay claim);
 - d) Mr G Adams & Others v Maritime Transport Limited (Case Numbers 3401709/2015 & Others) (“Fourth Claim”) (holiday pay only).
2. The third claim was struck out on 26 June 2015 and there was no reconsideration or appeal of that decision.
3. The first and second claims were struck out on 26 June 2015. That decision was subject to an appeal. The decision of His Honour Judge Richardson was handed down on the 3 October 2016 allowing the appeal in part. The parties sought further clarification of the order made by him and this was given in a further order of 19 June 2017.
4. It was agreed at this hearing that the effect of that order was that the following 11 claims that had been struck out were restored and continue: -
- 4.1 Ansell;
 - 4.2 Adams;
 - 4.3 Bell;
 - 4.4 Davey;
 - 4.5 Smith;
 - 4.6 Jastrebski (P);
 - 4.7 Jastrebski (D);
 - 4.8 Lucas;
 - 4.9 Morris;
 - 4.10 Sparks; and
 - 4.11 Wentworth-Wood.
5. Claim four was issued on 11 September 2015. Some of the claimants in that case are the same as those that are now remitted from the original claims but for the avoidance of doubt those that are in the fourth claim are as follows:-
- 5.1 Ansell;
 - 5.2 Adams;
 - 5.3 Beales;
 - 5.4 Bell;
 - 5.5 Fairs;
 - 5.6 Fox;
 - 5.7 Jastrebski (P);
 - 5.8 Luff;
 - 5.9 Jastrebski (D);
 - 5.10 Reddings;
 - 5.11 Sparks;
 - 5.12 Robinson; and
 - 5.13 Wentworth-Wood.

6. It was agreed at this hearing as follow: -
 - 6.1 The first and second claims should be consolidated with and heard together with the fourth claim because they involve similar issues of law and fact.
 - 6.2 The s.145B claim should be severed from the holiday pay claim because such claims require different evidence and legal arguments. This was subject to further discussion and the claims are not yet severed and will continue to be case managed together. It maybe they will be formerly severed at the next preliminary hearing and separate trial directions made.
 - 6.3 The issue of duplication between the fourth claim and the first and second claims has now been resolved between the parties with the revised schedules submitted by the claimants on the 2 February 2017.

Further and better particulars of the first and second claims

7. The respondent argues that they have not as yet received the same level of particularisation in relation to the earlier claims as they have received in the fourth claim. As a result it cannot yet fully understand all claims that it has to meet. There was little dispute that further particularisation should be made in this respect and an order in agreed terms is set out below.

The Regulation 13A claims

8. The respondent argues that the further and better particulars provided in this respect in the fourth claim on 28 October 2016 are defective. They argue that these particulars fail to specify the order in which leave was taken and in particular which periods of leave relate to Regulation 13A leave. The further and better particulars only clarify the payments to be included in the calculation of the Regulation 13A claim. It is submitted on behalf of the respondent that the order of leave and the precise specification of the type of leave for each period is crucial when it comes to the viability of both the Regulation 13 and Regulation 13A claims, and whether the claimants can make out a series of deductions in respect of each free standing claim.
9. Although the claimants have submitted that the first 20 days in each case was Regulation 13 leave, and thereafter the leave taken was Regulation 13A, that is entirely missing from the schedule.
10. The tribunal was taken to the schedules provided in February 2017 for example page 296 of the bundle in relation to Mr Beales. This provides the dates of payment and the rate and holiday allegedly underpaid but what it is submitted is missing in each case is the order in which leave was taken and the basis for that contention. Further and better particulars in narrative form were provided on the 28 October 2016 in response to an earlier order. Paragraph 23 of that document merely states "It is to the statutory entitlement that the claimants' claims relate" but it was submitted that relates to a different claim.

11. It was submitted that the respondent had been after particularisation of these claims for years, and the tribunal had already made an order asking that the claimants specify how the leave is to be taken, and they have failed to provide that. An unless order should therefore be made in the light of the poor track record. It is a legitimate request for the respondent to understand the different types of claim.
12. On behalf of the claimants Miss Urquhart stated she was only aware of this challenge the morning of this hearing. There is an issue of proportionality as these are low value claims. *Bear Scotland* made it clear that the first 20 days are Regulation 13 leave and thereafter the leave taken is Regulation 13A. The schedule submitted show all the facts from which that information is available. It is unnecessary for the claimants to adjust these tables when the information is already there. If however it is suggested that the claimants incorporate further information into the narrative further and better particulars order than the claimants' counsel did not see that could be resisted. To actually re-calibrate all the schedules is a step too far.
13. The Judge questioned what the claimants had to say about the respondent's argument that they are not able to assess whether there has been more than a 3 month gap. Miss Urquhart took the tribunal to some of the schedules and stated that as the holiday year is the calendar year all that was necessary was to count the number of days leave taken and it could therefore be seen when 20 days have been exhausted. Counsel for the claimants therefore argued it was not necessary for further information to be provided as it could be easily calculated from the schedules when the first 20 days had been exhausted.

The tribunal's conclusions on the Regulation 13A issue

14. The tribunal was not satisfied that the schedules needed to be amended in this respect, in that it is the payment date that is relevant to establish whether or not there has been a break in a series of deductions and the payment date and how many days leave that included is shown on the table. What the tribunal determined should however be included in the further and better particulars ordered is the claimants' position that each of them was taking Regulation 13 leave first and then Regulation 13A leave must be specifically stated. Each schedule should, for the sake of absolute clarity, identify in the details of the top the dates of the Regulation 13 leave. So for example in Mr Sparks' case at page 289 the claimant should state this is that leave taken from the 9 January it appears to the 17 April 2015.
15. The tribunal declined to issue an unless order at this point but made it absolutely clear that if there is a further failure to provide this clarification one would be granted on application.
16. The order made is as set out below.

Application to amend the claims

Submission on behalf of the claimants

17. Ansell, Adams, Beales, Bell and Luff applied for leave to amend. The background is that on 29 January 2016 the claimants' solicitor stated that they intended to apply but made no application. The application was made on 13 April 2016. At the hearing before this Judge on 2 September 2016 an order was made that a fully particularised application to amend be received by 28 October 2016.
18. Counsel for the claimants submitted that Mr Luff then provided new dates but the others were the same as they had originally provided in January 2016.
19. There are only modest sums claimed, Mr Adams claims a further £41 and Mr Ansell £21.80. Justice and fairness suggests that the application to amend should be granted. It is not dissimilar to updating a schedule of loss. That is permitted prior to the hearing and in essence that is what is being sought to be done here. It is not a "moving target". Obviously if there were further applications then that could be taken into account. These are not new heads of claim but essentially updating, there would be no prejudice to the respondent. The Presidential Guidance invites the Employment Tribunal to allow these amendments.
20. It has to be accepted that the claims would be out of time. However Selkent makes it clear that is not the be-all and end-all, and that the tribunal still has a discretion. The claims of Mr Luff would however be in time.
21. It is not the claimants' fault that the application needs to be made. The Judge is familiar that the claimants' instructing solicitors are struggling to get through the volume of work and although that is not as it should be and apologies are given, that is not the claimants' fault. The prejudice to the claimants' is they would have to bring fresh claims but they would be in breach of the relevant time limits. They would therefore potentially lose the opportunity to bring that claim and there is therefore greater prejudice to them than the respondent.
22. If the amendment were granted it would not affect the timetable as there is no trial timetable set as yet. It would also not add to the costs or the length of the hearing.
23. On behalf of the respondent it was submitted this is not a case of updating a schedule of loss. Reference was made to the authority of Amey Services Ltd and Others v Aldridge and Others UKEATS/0007/16. That was a decision of the Scottish EAT given on 12 August 2016. The tribunal was asked to consider paragraph 21 in which it was made clear that the tribunal must grapple with time limits at this stage and that to grant an application that is significantly out of time may cause prejudice to the respondent as it is then prevented from pursuing a limitation defence that would otherwise have been available to it.
24. Further it was submitted that there is no explanation offered as to why the claims need updating, and why this was not done much sooner. It is not known

whose fault this is, whether it is the solicitors or the claimants not giving instructions. The first time that the actual deductions are seen is October over a year after the expiration of the limitation period.

25. It is not only a breach of this tribunal's order to provide particularity but also the Presidential Direction which stated that details must be provided. That should not be condoned.
26. The fact that these are modest claims and the argument about where prejudice lies works both ways. By not allowing the amendment the tribunal is only preventing the claimants from pursuing a relatively modest sum, but the respondent also states that that should be taken into account in refusing the amendment as little prejudice will be caused to the claimants.

The tribunal's decision on amendments

27. Prior to giving the decision the Judge checked with the claimants and confirmed that Mr Ansell is seeking to add £22.80, Mr Adams £41.35, Mr Beales £91.22 and Mr Bell £3.76. These are all in relation to leave in September 2015 and therefore the limitation period expired in December 2015.
28. The first indication of an application for leave to amend was the 13 April 2015 but no application was then made. The application was not made until over a year later in pursuant to an order of this Judge. It was made on the 28 October 2016 by which time any claim was significantly out of time.
29. Consideration has been given to the case of Amey and in particular as set out at paragraph 22 that the employment tribunal had been right in that case to acknowledge that "the amendments in question sought to introduce new claims albeit new claims that were related to those already made, and it was conceded before me that he had been correct so to categorise them".
30. The employment tribunal must therefore consider time limits. The claims are significantly out of time and no explanation has been given as to why they were not brought within time or a reasonable time thereafter. This is particularly relevant as the amendment sought to be introduced so near to the date of the actual issue of the claim. In paragraph 22 of Amey Lady Wise comments that it is even more difficult to justify amending outside the time limit where the claim arises after the original application.
31. The balance of prejudice must be considered and whilst acknowledging they are relatively modest sums the case of Rawson (Rawson v Doncaster NHS Primary Care Trust [2008] UKEAT/0022) makes the point that to allow an amendment in such circumstances deprives the respondent of the limitation defence it would have had.
32. Leave to amend is therefore refused in relation to the four claimants set out above.
33. Mr Luff is in a different category and seeks to add dates from the 27 November 2015 to 5 August 2016. Those claims should therefore have

been brought by 4 November 2016, and the application for leave to amend was submitted on 28 October 2016. His claims were therefore still in time at the date the application to amend was made. It is correct that he has not either provided evidence as to why these were not made at the time or brought sooner, he could at the date of the application to amend have issued a new claim. Whilst acknowledging these are new claims the tribunal is satisfied in relation to Mr Luff that it is both proportionate and in accordance with the overriding objective, and the Presidential Direction to grant leave to amend to add these amounts rather than for Mr Luff to have to bring a new set of proceedings. His additional claims are not so modest, however the addition will not add significantly to the preparation for trial and it is still at an early stage of these proceedings with no trial timetable.

34. Leave to amend is therefore granted for Mr Luff to amend his claim.
35. Orders have been made as set out below and it was agreed there would be a one day preliminary hearing in public which has been listed taking into account dates to avoid. At that hearing amongst other matters there will be further case management of all claims, consideration as to the severance of the section 145B claims and directions for trial in relation to all of the actions.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. By the **2 November 2017**: -
 - 1.1 In relation to the first, second and fourth claims;
 - 1.1.1 The claimants to provide further and better particulars in a single document covering all claimants for the period of the claims in the same format as that provided on 28 October 2016.
 - 1.1.2 The claimants to provide complete schedules covering all periods of each claim for each claimant in the same format as those provided by the claimants on 2 February 2017.
 - 1.1.3 The claimants to also include in the further and better particulars ordered the order in which leave was taken, the type of leave taken, whether Regulation 13 or 13A and the basis for that contention; and to identify at the top of each schedule the period of Regulation 13 leave taken.
2. As a result of the application for leave to amend being denied for Messers Ansell, Adams, Beales and Bell they produce schedules to the date of issue of their claims.
3. The claimants to provide a response to the request for further and better particulars of the TULRCA claim dated 19 June 2015.

4. The respondent has leave to serve an amended response by **30 November 2017** in relation to the first, second and fourth claims.
5. There be a **public preliminary hearing on 18 December 2017 before Judge Laidler with a time estimate of 1 day. This will be held at Bury St Edmunds Employment Tribunals, 1st Floor, Triton House, St Andrews Street North, BURY ST EDMUNDS, IP33 1TR.**
6. Any applications that either party wishes to be heard at that preliminary hearing must be submitted to the other party and the tribunal **no later than 14 days before the preliminary hearing.**

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Laidler

24October 2017

Sent to the parties on:

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For the Tribunal:

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