

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4102002/17**

5

**Held in Glasgow on 15 May 2018**

**Employment Judge: G Woolfson**

10

**Miss Halide Mustafa**

**Claimant  
In Person**

15

**ScotNursing Ltd**

**Respondent  
Represented by:  
Ms K Irvine -  
Consultant**

20

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that the application to amend the claim to include claims of automatic unfair dismissal is refused.

25

**REASONS**

**Introduction**

30

1. The claimant was unrepresented. The respondent was represented by Katherine Irvine. The claimant produced a bundle of documents. The claimant and Ms Irvine put forward representations and submissions to the Tribunal. No evidence was led.

35

**The issue**

**E.T. Z4 (WR)**

2. The issue to be determined by the Tribunal was whether to allow the claim to be amended to include claims of automatic unfair dismissal.

**Background**

5

3. The claimant was employed by the respondent from 20 June 2016 until 6 June 2017. The claim for unfair dismissal and breach of contract was received by the Employment Tribunal on 14 June 2017.

10

4. A Preliminary Hearing took place on 23 February 2018. The issues to be determined by the Tribunal were: (a) whether the claimant had sufficient service to claim unfair dismissal, and (b) whether an application to include a wages claim (as well as breach of contract) should be accepted.

15

5. A judgment was issued on 10 March 2018. The claim for unfair dismissal was dismissed as the claimant does not have the necessary qualifying service. The application to include a wages claim was accepted.

20

6. By email dated 15 March 2018 the claimant requested reconsideration in respect of the dismissal of the unfair dismissal claim. The claimant explained that she was aware she did not meet the requirements of section 108 of the Employment Rights Act 1996 (which requires two years of continuous service to claim unfair dismissal). However, the claimant stated that she had material on which to prove how she had been unfairly dismissed.

25

7. By email dated 7 April 2018 the Tribunal refused the application for reconsideration on the basis that there was no reasonable prospect of the original decision being varied or revoked.

30

8. By emails dated 9 and 15 April 2018 the claimant stated that she believed she would meet the exceptions to the rule under section 108. By email dated 2 May 2018 the claimant was asked to confirm to the Tribunal which of the

exceptions to section 108 she says applies, as this had not been stated in the claim form.

9. By email dated 3 May 2018 the claimant stated the following:

5 *"I can confirm the exceptions to Section 108 of Employment Right Act 1996 that applies are:*

- *Working time regulations – dismissal for asserting rights under the Working Time Regulations 1998, SI No.1833 s101A ERA.*
- *Right to be accompanied at disciplinary or grievance hearing or a meeting under the statutory retirement procedure.*
- *National Minimum Wage – dismissal in connection with an attempt to exercise any right under the National Minimum Wage Act or seek enforcement of the National Minimum Wage s104A ERA."*

10

15

10. By email dated 8 May 2018 the Tribunal explained to the parties that the Employment Judge's provisional view was that the email of 3 May 2018 should be treated as an application to amend the claim to introduce a claim of automatic unfair dismissal. Following receipt of written representations from both parties, the Tribunal decided to hold a Preliminary Hearing.

20

11. At the Preliminary Hearing it was explained that although the Preliminary Hearing arose from a reconsideration application, the original judgment which dismissed the unfair dismissal claim due to the claimant not having a sufficient length of service was not being reconsidered. Rather, the Preliminary Hearing was set down to consider whether the claim in respect of wages / breach of contract should be amended to include claims of automatic unfair dismissal.

25

30

**The submissions**

12. The claimant made submissions first, followed by Ms Irvine and the claimant then provided her response.

5 13. The following is a summary of the points put forward by the claimant:

10 a. Within the ET1 she tried to be as clear as she could. It is very complicated as there is so much involved. She ticked the unfair dismissal box because as far as she is concerned she was unfairly dismissed. In section 8.2 of the form, there are only so many characters which you can use (she submitted the claim online).

15 b. The respondent did not give her answers when she questioned her rate of pay. The Finance Director would never give her confirmation of her hourly rate.

c. She raised a grievance and stated in the grievance that she had gone to various people and followed procedures.

20 d. The response to the Tribunal claim from the respondent refers to concerns around her work conduct. She considers these to be false allegations. The respondent had asked her to come back to work for them after she had worked there previously. Her appraisals were good.

25 e. The company handbook states that a grievance meeting should take place within three or four days and that she is allowed to bring somebody along with her if she wishes. She sent in her grievance at 9:20pm on the Monday evening (5 June 2017). She was due to start work at 12 noon the following day. At around 1:00pm on 6 June 2017  
30 she was asked by the company secretary to have a chat, and a meeting took place which the company director also attended. The claimant thought that they would tell her the issues raised in her grievance would be sorted out. Instead, they stated that it would be

best if the claimant left and did not work her notice. She was asked to leave as soon as possible.

5 f. In response to a question from the Employment Judge as to why this information was not in the ET1, the claimant stated again that there was only a certain amount of characters in the online form. She put in what she could to make the claim sound and she tried her hardest to make it clear. She sees the issue about the ET1 form, however her concerns are set out in the grievance which she raised.

10

g. In response to a question from the Employment Judge as to what the issues were which she raised in her grievance, the claimant stated that the issues were: (1) pay, (2) she had tried to resolve this before putting in the grievance, (3) she had tried to ask the Finance Director but never received a direct answer, and (4) she had to chase up her contract of employment for so long.

15

h. In response to a question from the Employment Judge as to what the pay issue was, the claimant stated that the issue was on-call pay and her hourly rate. She stated that if she was on an hourly rate then she would have been able to work out what they had paid her for on-call. She stated that one minute she had been told she was on an hourly rate and then she was told she was salaried.

20

25 i. Even though she started on 20 June 2016, she did not receive a contract employment until September 2016. Part of her grievance was to let the company know that it had been a long process to even receive a contract. She felt like they did not care about her.

25

30 j. In response to a question from the Employment Judge regarding the relevance of the Working Time Regulations (with reference to the claimant's email of 3 May 2018), the claimant stated that she did not know and that she was confused. When asked by Ms Irvine to provide further information in relation to this, the claimant stated that she did

30

not know how to answer the question. When asked by the Employment Judge whether she was saying that she was asserting rights under the Working Time Regulations, the claimant stated that she was trying to find her rights but she did not receive an answer to her questions. She wanted to know what her rights were, but everything was hidden from her. She believes she has been exploited.

5

k. When asked by the Employment Judge to expand on the second bullet point of her email of 3 May 2018, the claimant stated that the company did not follow its own handbook or procedure. She had not even been given a chance to have a grievance meeting.

10

l. When asked by the Employment Judge to provide further information with regard to the national minimum wage issue raised in her email of 3 May 2018, the claimant stated that she had tried so hard to find out what her pay was and what her minimal pay was, but that information had never been given to her. It had always been very vague. When she received her wage slip after starting in June 2016, the amount she received was more than she had expected, and this was confusing. She does not think the Finance Director knew herself what her pay was or should be. She received no answer as to what her hourly rate was, or even if she had an hourly rate. She wanted to end this confusion. Her queries about pay were ignored.

15

20

25

m. When she started her first period of employment with the respondent, in 2014, she had concerns about how the company was addressing annual leave. She did not think it was right but did not question it too much. She is concerned with the way they work out holidays for agency staff.

30

n. When asked by the Employment Judge whether she is saying that she had been looking for clarification around her pay, the claimant said that was correct. She was looking for clarification on how her on-call pay worked, as it had gone up.

5 o. They let her go because she handed in a grievance letter. There were problems they did not want to deal with and they wanted to brush it under the carpet. There was no indication of any problem with her work conduct, and they let her go within one day after she sent in her grievance.

10 p. After having heard from Ms Irvine for the respondent, the claimant stated that everything had mentioned on-call, fair pay and her dismissal. It's about these three things. These same things have been said time and again. Legally, she does not know how else to word it. She has made it clear that she was let go only one day after her grievance was submitted and after trying to find out information which they did not wish to talk about.

15 q. She had mentioned fair pay and national minimum wage and did not know if they were paying her the national minimum wage. She is trying to be as simple and straightforward as possible. When asked by the Employment Judge to confirm when she mentioned fair pay and  
20 national minimum wage, the claimant stated that she raised this at the Preliminary Hearing on 23 February 2018.

25 14. The following is a summary of the points put forward by Ms Irvine on behalf of the respondent:

a. Ms Irvine firstly referred to an email she sent to the Tribunal on 10 May 2018. That email set out the respondent's objections to the application to amend. In summary, the email states the following:

30 i. The claimant is seeking to introduce entirely new heads of claim. These are not merely amending the factual or legal basis of an existing claim. At no previous stage had the claimant sought to put forward any legal claim of automatic unfair

dismissal linked to any of the section 108 exemptions, and this cannot be implied from the existing ET1.

5 ii. With reference to the case of **Selkent Bus Co v Moore** the Tribunal should balance the injustice and hardship of allowing the amendment against the injustice and hardship or refusing it.

10 iii. This claim is becoming a movable feast with the claimant attempting to widen the scope and nature of the claim despite already having had the opportunity to do so at the last Preliminary Hearing (after which she was allowed to amend in a claim of unlawful deduction of wages). The respondent faces a considerably lengthened hearing and will require additional witnesses, if the new claims are allowed to proceed.

15

iv. The claimant has provided no details of the facts upon which the new heads of claim are based. It would be usual and expected for the factual and legal basis for the claims seeking to be amended to be fully and clearly set out.

20

v. All of the new claims have been brought out of time, and well outwith the usual three month time period from the date of dismissal. The claimant's dismissal was 6 June 2017, so almost a year has passed. The claimant has put forward no explanation as to why she says it was not reasonably practicable to have brought the claims on time.

25

vi. At the Preliminary Hearing on 23 February 2018 the claimant did not allege any attempts to exercise any rights under the Working Time Regulations, the right to be accompanied or the National Minimum Wage Act.

30



- 5
- b. The email of 10 May 2018 placed the claimant on notice of the need to provide clear factual background as to the basis for the claims she is seeking to introduce. However, she has not done that. Ms Irvine is still unclear as to what the claimant says is the basis of the claims being sought to be introduced.
- 10
- c. With regard to the right to be accompanied, one must ask for that. In response to the Employment Judge pointing out that the claimant's grievance states that she wished to be accompanied, Ms Irvine stated that the claimant's issue appears to be that she was denied the opportunity to have a grievance at all, not the right to be accompanied. The claim which the claimant is trying to introduce is that she was dismissed because she sought the right to be accompanied. (In response to this, the claimant stated that she had not been allowed the chance to have a neutral representative to speak on her behalf.)
- 15
- d. With regard to balancing hardship, the claimant had indicated previously that she obtained new employment in August 2017, and Ms Irvine initially stated this is relevant in terms of the potential value of any claim for unfair dismissal. However, following comments from the claimant that she had only worked in August for one and a half weeks because of her health and that she has not been in employment since then and is suffering both financially and emotionally as a result of what has happened, Ms Irvine stated that her comment regarding this is withdrawn and is not to be taken into account by the Tribunal.
- 20
- 25
- e. A claim for unfair dismissal would substantially lengthen the duration of the hearing. The claims are out of time and previously there has been no hint of issues regarding the Working Time Regulations, national minimum wage or the right to be accompanied.
- 30
- f. With regards to the online form ET1, the claimant completed section 15 of the form which provides plenty of opportunity to add any additional information. However, this had not been done.

- 5 g. The claimant's bundle of documents include correspondence between the claimant and ACAS in October 2017, so if the claimant had been in any doubt then she could have taken advice from ACAS. This would have been an opportunity to identify what claims were to be brought, even if the claimant did not necessarily know about, for example, Working Time Regulations or the national minimum wage.
- 10 h. The correspondence with ACAS shows that the claimant was aware of concerns which the respondent had. (The claimant responded by explaining that she had prepared detailed statements and it all happened within the same week and she wanted matters to be resolved).
- 15 i. This appears to be a dispute about the level of pay, or how pay was reflected in terms of hours worked, rather than breach of the Working Time Regulations or national minimum wage. The claimant states that her pay was higher than she was expecting, rather than lower.
- 20 j. The only mention of the Working Time Regulations was in a reference to agency workers.
- 25 k. The Employment Judge pointed out that the ET3 anticipated an argument that the dismissal was related to the bringing of the grievance. Ms Irvine stated that they (i.e. the company she works for) generally try to cover off issues when a claim is unclear, and this itself would have put the claimant on fair notice that she could have set out the basis for any such claim prior to the first Preliminary Hearing and prior to this Preliminary Hearing. It is not for the respondent to set out
- 30 the claimant's case.

**Discussion and conclusion**

15. With reference to the **Selkent** case, one of the factors to be taken into account is the nature of the amendment and whether the amendment sought is a  
5 minor matter or a substantial alteration which changes the basis of the existing claim.

16. Although the ET1 included a claim of unfair dismissal, the only reference to the dismissal is in the following statement (which has been anonymised for  
10 the purposes of this judgment):

*“I sent a grievance letter via email to the company and finance director and the next day of work was asked if I had a sec to where was taking into the board room by [the company lawyer], to where [the company director] came  
15 as made decision that they wished to let me go.”*

17. There is nothing in the ET1 which indicates the claimant was alleging that her dismissal was for any of the reasons subsequently set out in her email to the Tribunal of 3 May 2018. The claimant is therefore seeking to introduce a claim  
20 of automatic unfair dismissal, which is a claim not envisaged in the ET1. This would be a substantial alteration and a new cause of action.

18. At the Preliminary Hearing the claimant was clear that she believes the reason she was dismissed is because she had submitted her grievance. The  
25 following is the relevant extract from her grievance, anonymised for the purposes of this judgment:

*“I have had issue’s in regards to my pay since 2 months of re-joining ScotNursing in June 2016 (Monday 19<sup>th</sup>). Within a couple of weeks, I had  
30 spoken to my Line Manager [name] regarding how my pay works on my return to which she advised me that I would have to go and speak to [the Finance Director] regarding that as she deals with those matters, to which I did follow her advice. I felt that when I did question [the Finance Director] in regards to my pay, she was very vague with her answer. I then lay off the issue for a few*

weeks as I thought that because my return was so sudden - it may take some time to get my file on record again. After a few weeks of space, I had an issue in regards to my pay and I approached [the Finance Director]. I also, enquired about my contract of employment - which I still hadn't had as this was now going onto the second month. I had several confidential chats with [the Finance Director] regarding chasing up my contract of employment, as this would most possibly help me understand the issue I'm having as we were now into 3 months of this on going issue. I then received my contract of employment on 25<sup>th</sup> August 2016. I didn't sign it straight away as I wished to go over some things stated in the contract - to which I was suppose to speak with [the Finance Director]. The company Lawyer [name] e-mailed me querying that my contract hadn't been given back and if any problems that can help with, in which I did reply - to advise her I was waiting on a chat with [the Finance Director]. [Name] had advised me that if she could assist me, she would be there for help. I tried to resolve this issue on my own - which clearly is appearing to be extremely difficult – with [line manager] and [the Finance Director] for months to the point where it was now the New Year of 2017. In mid January 2017 I arranged a meeting with [lawyer] on my day off to go over some issues I was experiencing. At the end of the meeting, which was held at the Head Office on 4<sup>th</sup> floor suite [she] advised me that she will now take all my information I provided her with and arrange to sit with [the company director] and [the Finance Director] and go over things i.e. job descriptions, pay etc and getting New Contract of Employment. Before I left the head office, I had filled out Core Staff Holiday Request forms out for almost the whole year head as being organised is in my character and passed them to [line manager] for approval. Since the meeting with [lawyer] in January 31<sup>st</sup> 2017, it has been a very much extremely slow process in the little changes being made to which has made issues at ScotNursing very difficult to cope with as this has caused me major issues to my life outside of work. As I have been going back and forth due to very poor communication and the issue is still unresolved, I believe I am on Stage 3 of the Grievance procedure.”

19. The grievance concludes with the following:

5 *“I look forward to your response with the details of the arranged Grievance Meeting - which is noted in ScotNursing Handbook 2017 ‘an interview will be arranged within 3 working days’. Where we can have a discussion and hopefully come to a solution. I would also like to be accompanied by a natural party.”*

10 20. On reading the grievance, it is clear the claimant was not asserting rights under the Working Time Regulations 1998. When asked to provide further information regarding her reference to this in her email of 3 May 2018, the claimant was unable to do so. The claimant has not produced any information, either in the ET1 or at the Preliminary Hearing, to indicate there is any basis for a claim under section 101A of the Employment Rights Act  
15 1996, which is the statutory provision referred to in the claimant’s email of 3 May 2018.

20 21. With regard to wages, the claimant is clear that the issue which she was trying to resolve at work was on-call pay and her hourly rate, and indeed whether there was an hourly rate at all. The claimant says she was confused by vague information provided to her. She explained that when she received her wage slip after starting in June 2016, the amount she received was more than she had expected, which was confusing. The grievance is consistent with the claimant having concerns about her pay and how it had been calculated.  
25 However, the claimant said nothing to suggest that during her employment she raised concerns about the national minimum wage. The claimant’s grievance makes no mention of the national minimum wage. The claimant has not produced any information, either in the ET1 or at the Preliminary Hearing, to indicate that there is any basis for a claim under section 104A of  
30 the Employment Rights Act 1996, which is the statutory provision referred to in the claimant’s email of 3 May 2018.

22. Although the claimant’s grievance refers to her wish to be accompanied, it is clear the claimant’s concern was (and is) that a grievance meeting did not

take place and that she did not have the opportunity to discuss her grievance at a meeting. The claimant believes she was dismissed simply because she had raised the grievance. The claimant is not claiming that the fact she concluded her grievance with a statement that she wished to be accompanied was the reason for her dismissal. Rather, her complaint is that it was the raising of the grievance itself, i.e. the whole grievance, which is the reason for her dismissal.

5

23. The email of 3 May 2018 also refers to the statutory retirement procedure. The claimant provided no information with regard to this, and it is not clear what this claim would be or on what basis it would be brought. This is not considered to be relevant.

10

24. The claimant is therefore relying on three grounds for automatic unfair dismissal, referred to in her email of 3 May 2018. However, no basis for such a claim has been presented. As such, the claimant is seeking to make a substantial alteration to her claim, but without presenting a basis on which to do so.

15

25. The time limit for raising an unfair dismissal claim expired on 6 September 2017, i.e. three months less one day from the date of termination of employment plus the period of early conciliation, which lasted one day. Therefore, the amendment application (i.e. the email of 3 May 2018) was presented almost eight months out of time. No information has been presented to suggest it was not reasonably practicable for such a claim to be presented in time.

20

25

26. It is accepted that the claimant, who is unrepresented, cannot be expected to use legal language. However, the claimant provides in section 8.2 of the ET1 quite some detail regarding her concerns around shift patterns and on-call pay and states that she tried to resolve these issues. If the claimant had been concerned that her dismissal was for some other reason, she could have included this within her ET1 even in basic terms and without using legal language (and if necessary she could have used section 15 of the ET1). The

30

Tribunal considers it would have been reasonably practicable for her to do so. In any event, having raised the new claim out of time, no basis for the claim has been provided.

- 5 27. It is important for the Tribunal to consider whether allowing, or not allowing, the amendment would cause injustice or hardship to either party. If the amendment is not allowed the claimant will be unable to claim financial loss beyond the termination of her employment. On the other hand, if the amendment was to be allowed the respondent would need to defend
- 10 allegations that the dismissal was for one or more prohibited reasons, in circumstances where the claimant is not providing any basis for such allegations, and the onus is on the claimant to do so. This would require evidence to be led regarding the reason for dismissal, which would increase the length of the hearing and risk the claim being run as essentially a standard
- 15 claim of unfair dismissal in circumstances where the law operates to prevent such claims where employees have less than two years of service. Given the legal parameters, that would not be a just way for the case to proceed.
28. For the reasons set out above, the application to amend the claim to include
- 20 claims of automatic unfair dismissal is refused.
29. The claim will proceed as a claim for breach of contract and unauthorised deductions from wages.

25

**Employment Judge: G Woolfson**  
**Date of Judgment: 21 May 2018**  
**Entered in register: 25 May 2018**  
**and copied to parties**

30