EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr S Withington		**Desmi Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
ON A PRELIMINARY HEARING
(RESERVED JUDGMENT)

HELD AT Newcastle-under-Lyme **ON** 7 February 2019
12 April 2019 (Panel Only)

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **Mr E Gould (Counsel)**
For the Respondent: **Mr G Mahmood (Counsel)**

JUDGMENT

The Judgment of the tribunal is that: -

1 Pursuant to Rule 29 of the Employment Tribunals Rules of Procedure, the claimant has permission to amend **Case Number 1303368/2018** to include a claim that, on 9 March 2018, he was unfairly dismissed.
2 Pursuant to Section 111(2)(b) of the Employment Rights Act 1996, **Case Number 1303438/2018** was presented in time and the Employment Tribunal has jurisdiction to consider it.

REASONS

Introduction

1 The claimant in this case is Mr Simon Withington who was employed by the respondent, Desmi Limited, as Sales Director: Defence & Fuel UK, from 16 March 1991 until 9 March 2018 when he was dismissed. The reason given at the time for the claimant's dismissal was redundancy.

2 **Case Number 1303368/2018** (the first claim) was presented to the tribunal on 4 July 2018: it is a claim for unlawful deduction from wages and for breach of contract; the claim is quantified at £14,906.40. It is common ground between the parties that, having regard to the ACAS conciliation procedure, the limitation period for the presentation of these claims pursuant to Section 23(2) of the Employment Rights Act 1996 (ERA) and Article 7 of the Employment

Tribunals Extension of Jurisdiction (England & Wales) Order 1994 expired on 9 July 2018.

3 On 10 July 2018, the claimant applied to amend the first claim to include a claim for unfair dismissal. This was at a time before the claim form had been served on the respondent; and before any response to the claim had been prepared or submitted. The respondent objects to the amendment application: principally, on the ground that pursuant to Section 111(2) ERA the claim for unfair dismissal contained in the amendment was presented out of time and the tribunal has no jurisdiction to consider it. It is common ground between the parties that the unfair dismissal claim was presented one day late.

4 At the same time as making his application to amend the first claim, the claimant presented **Case Number 1303438/2018** (the second claim) which is a claim against the respondent for unfair dismissal. It is the respondent's case that the tribunal has no jurisdiction to consider this claim as it was presented out of time. Again, it is common ground between the parties that the claim was presented one day late.

5 On 16 July 2018, I directed that the two claims should be consolidated and heard together. On 24 September 2018, Employment Judge Findlay directed that there should be a Preliminary Hearing to determine the following issues: -

(a) Whether the claimant should be granted permission to amend the first claim in accordance with his application dated 10 July 2018.
(b) Whether, having regard to the provisions of Section 111(2) ERA, the tribunal has jurisdiction to consider the second claim.

6 It is the determination of these issues with which I am concerned today. I am not dealing with any wider issues of the claimant's claims; although I will make appropriate Case Management Orders in due course.

The Evidence

7 I heard evidence from three witnesses: firstly, the claimant gave evidence on his own account to explain the circumstances in which his unfair dismissal claim was not presented until 10 July 2018; he called his wife, Mrs Clare Withington, to give supporting evidence; the respondent called Mr Lee White – Managing Director.

8 In my judgment, all witnesses were honest and gave evidence to the best of their recollections. Mrs Withington was especially impressive. Mr White's evidence was of limited value: he was simply reporting on a conversation and email exchange he had with a colleague Mr Andrew Williams who is based in Denmark. The claimant and Mr Williams had had a chance conversation whilst

Mr Williams was visiting the UK on 9 July 2018. Mr White simply reported Mr Williams' version of that conversation; Mr Williams did not make a witness statement, nor did he attend the hearing to give oral evidence.

9 Mr Gould was critical of the respondent for providing Mr Williams' evidence in this way: in particular, he accused Mr White of asking Mr Williams a closed question about that conversation such that Mr Williams could have been afraid to provide a truthful answer. In my judgement, this criticisms is not justified: the respondent was put in the position it was of obtaining Mr Williams' evidence in this way because it was not until three days before the hearing that the claimant provided a witness statement or any other explanation as to the significance of that conversation.

10 I was also provided with an agreed bundle of documents running to some 115 pages. I have considered those documents from within the bundle to which I was referred by the parties during the hearing.

The Facts Relevant to the Preliminary Issues

11 On 9 March 2018, the claimant was dismissed: the reason given at the time of his dismissal was redundancy. On 26 March 2018, he commenced the ACAS Early Conciliation process; the ACAS Certificate was issued on 26 April 2018. As previously indicated, it is common ground between the parties at the limitation period for the presentation of an unfair dismissal claim expired on 9 July 2018.

12 On 4 May 2018, the ACAS conciliator wrote to the respondent stating that the basis of the claimants claim was unfair dismissal and breach of contract. On 16 May 2018, solicitors acting on the claimant's behalf wrote to the respondent again intimating the claimant's intention to present a claim for unfair dismissal.

13 On 4 July 2018, the first claim was presented: this was for unlawful deductions from wages and for breach of contract. The claimant explained in evidence that he had decided against a claim for unfair dismissal as he did not believe that he had the evidence which would establish such a claim and he did not wish to take the risk of pursuing an unmerited claim.

14 On the evening of 9 July 2018, the claimant and his wife had a chance meeting with a number of the claimant's former colleagues including Mr White and Mr Williams at a restaurant in Stoke-on-Trent. The claimant had a short conversation with Mr Williams: the content of that conversation is disputed. The claimant's account is to the effect that the respondent had recruited a new Defence and Fuel Salesperson by the name of John Collins. The account given by both the claimant and Mrs Withington is that this news came as something as a surprise to them as it caused them to doubt whether in fact the claimant's role

with the respondent was truly redundant or whether he had effectively been replaced by Mr Collins. Mr Williams' account is that the claimant was not told anything of Mr Collins being a Defence and Fuel Salesperson, but that Mr Collins was a new Project Manager.

15 When they arrived home from the restaurant, the claimant and Mrs Withington went on-line and looked at the respondent's website; they also looked at Mr Collins' profile on LinkedIn. They claim to have discovered that Mr Collins had been employed as a Business Development Manager (Defence and Fuel): from what he read the claimant was satisfied that this was a direct duplication of his previous role; and that Mr Collins had apparently therefore been recruited, soon after his redundancy, to perform the role he had previously undertaken. This was new information which caused the claimant to believe that he had not been genuinely redundant and, therefore, that his dismissal was unfair.

16 The following day the claimant instructed his solicitors that he wished to pursue an unfair dismissal claim. The solicitors promptly applied to amend the first claim and, as a matter of precaution, they presented the second claim to the tribunal.

The Law

Time Limit – Unfair Dismissal

17 **The Employment Rights Act 1996 (ERA)**

Section 111: Complaints to Employment Tribunal

(2) .....an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

18 I have considered a number of decisions of the appellate courts: ***Capita Health Solutions Ltd -v- McLean*** **[2008] IRLR 595*; Wall's Meat -v- Khan*** **[1978] IRLR 499*; Dedman -v- British Building and Engineering Appliances Ltd*** **[1974] ICR 53*; Croydon Health Authority -v- Jaufurally*** **[1986] ICR 4*; London International College Ltd. -v- Sen*** **[1993] IRLR 333*; Riley -v- Tesco Stores Ltd & Another*** **[1980] ICR 323*; Northumberland County Council & Another -v-Thompson*** **UKEAT/0209/07/MAA; *Marks & Spencer***

Plc -v- Williams Ryan **[2005] ICR 1293; *Chohan -v- Derby Law Centre*** **[2004] IRLR 685; *Royal Bank of Scotland Plc -v- Theobald*** **UKEAT/0444/06; *Octopus Jewellery Limited -v- Stephenson*** **UKEAT/0148/07; *Palmer and Saunders -v- Southend on Sea Borough Council*** **[1984] 1 All ER 945; *Schultz -v- Esso Petroleum Ltd*** **[1999] 3 All ER 338**, taken together these decisions are authority for the following propositions: -

(a) That *'reasonably practicable'* means nothing more than '*reasonably feasible'*.
(b) What was reasonably feasible is a matter of fact for the tribunal to decide.
(c) Ignorance of the facts or of one's rights and obligations can render it not to be reasonably practicable to meet a deadline but the ignorance itself must be reasonable. The tribunal must consider what the claimant could or should have known with reasonable diligence.
(d) It follows that that the claimant must have taken such advice as was reasonably available.
(e) There are of course claimants who have come before the tribunal who have not been able to take advice because of funding problems, language problems, other communication problems, ill-health and many other reasons, all of which, in different cases, which turn on their own facts have been found to render it not reasonably practicable for the proceedings to have been commenced in time.
(f) In a case where a professional adviser has accepted a retainer which includes the presentation of a claim on behalf of a client, if the failure to meet the deadline or the other default is attributable to the negligence of the adviser, then this must defeat in the claim that it was not reasonably practicable; quite simply because, but for the adviser's neglect the deadline would have been met.
(g) In a case where a claimant has taken legal advice but has retained the responsibility to present the claim in person, if the legal advice is erroneous - particularly as to the time limit for presentation or the date of expiry thereof, and the claimant has reasonably followed such advice, this may render it not reasonably practicable for the claimant to present the claim in time. The same applies if erroneous advice is given by tribunal staff.
(h) If the claimant has a genuine and reasonable misunderstanding as to the facts, this too may render it not reasonably practicable to present the claim in time. This is particularly the case, if the claimant has been given inaccurate or inconsistent information as to the effective date of termination.
(i) Finally, when looking at the role of advisers the tribunal should have regard to the nature of the adviser who was actually giving the advice and in what circumstances.
(j) Where ill-health is relied upon the tribunal must make specific findings regarding the claimant's health and its impact on reasonable practicality.

19 Specifically in relation to a case of late acquired factual knowledge, I have considered further cases to which I was referred by the respondent: ***Machine Tool Industry Research Association -v- Simpson*** **[1988] ICR 558 (CA)** and ***Cambridge & Peterborough Foundation NHS Trust -v- Crouchman*** **[2009] EAT/0108/09 (EAT)**, these provide authority for the following propositions: -

(a) The tribunal must consider whether it was reasonable for the claimant to be unaware of the factual basis upon which he could bring a claim during the currency of the three-month limitation period.

(b) That the knowledge he has recently acquired has been reasonably acquired and that the knowledge is either crucial, fundamental, or important to the claimant's change of belief from one in which he does not believe that he has grounds for the claim to the belief which he reasonably and genuinely holds that he has such grounds.

(c) That the acquisition of this knowledge is crucial to the decision to bring the claim.

(d) In respect of each of the above the burden of proof rests with the claimant.

Amendment

20 The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order: Rule 29. Although there is no specific reference to amendment in the Rules, no doubt such an order may include one for the amendment of a claim or response.

21 In ***Selkent Bus Co Limited v Moore*** **[1996] ICR 836**, the EAT gave the following general guidance, each part of which is dealt with in more detail below.

(a) Whenever the discretion to grant an amendment is invoked, the tribunal should consider all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.

(b) **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 addition 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 must decide whether

the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(c) **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 application is out of time, and, if so, whether the time limit should be extended under the applicable statutory provisions.

(d) **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 for the making of amendments. The amendments may be made at any time – before, at, or 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.

(e) 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, because of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

22 ***The nature of the proposed amendment***

(a) Amendments that involve mere re-labelling of facts already fully pleaded will in most circumstances be very readily permitted: ***T&GWU v Safeway Stores Limited*** **UKEAT/0092/07**. An amendment may be allowed to correct the name of the claimant where an incorrect version of the surname was used by her solicitor: ***Cummings v Compass Group UK & Ireland Limited*** **UKEAT/0625/06**

(b) Generally, too a party wishing to amend to add new facts in support of an existing claim will be allowed to do so. However, "one can conceive of circumstances in which, although no new claim is being brought, it would, in the circumstances, be contrary to the interests of justice to allow an amendment because the delay in asserting facts which have been known for many months makes it unjust to do so*":* ***Ali v Office of National Statistics*** **[2005] IRLR 201 (CA) (**per Waller LJ)**.**

(c) In deciding whether a claim form contains a particular claim, it is necessary to look at the document as whole. The prescribed form of claim document lists the most common jurisdictions of the tribunal and required the claimant to identify those he claims by ticking a box. A Judge is likely regard as significant, when determining what claims are asserted, which boxes have been ticked. Direct and indirect discrimination are two different types of unlawful act, and a claim which asserted discrimination on racial grounds did not include a complaint of indirect race discrimination, and such a complaint required an application to amend: ***Ali v Office of National Statistics***. "The claim, as set out in the ET1, is not something

just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say-so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. … a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and [to] enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings": ***Chandhok v Tirkey*** **UKEAT/0190/14**.

(d) It is relevant to the exercise of the discretion that the new claim is closely related to the existing one, and depends on facts which are substantially already alleged; it is also relevant that it is a claim that the respondent "would reasonably have anticipated … as the natural, one might almost say inevitable, concomitant of [the original claim]" and that it was omitted "through a lawyer's blunder" (since a remedy against the claimant's solicitors is not equivalent to the primary remedy): ***T&GWU v Safeway Stores Limited***.

(e) The discretion is wide enough to enable the tribunal to allow a claimant to add or substitute a cause of action not available at the date of the claim form, since it had accrued later: ***Prakash v Wolverhampton City Council*** **UKEAT/0140/06.**

23 ***Time Limits***

(a) Time limits arise as a factor only in cases where the amendment sought would add a new cause of action. If a new claim form were presented to the tribunal out of time, the tribunal would consider whether time should be extended, either on the basis of the "not reasonably practicable" test (for example, for unfair dismissal) or on the basis of the "just and equitable" test (for example, for unlawful discrimination). If time were not so extended, the tribunal would lack jurisdiction to entertain the complaint, and it would fail.

(b) In ***T&GWU v Safeway***, the EAT reviewed the authorities and observed that, apart from authority, it might be thought wrong in principle for a Judge to exercise his discretion to allow a new claim by amendment

where it would not have been allowed if a new claim form had been presented: "to allow a claimant to – in effect – get around the statutory limitation period". It noted that in the civil courts a new claim may under CPR 17.4 (2) be introduced out of time by amendment if it "arises out of the same facts or substantially the same facts" as the existing claim but pointed out that this depends on Limitation Act 1980 s. 35 (2), whose terms are not repeated in the legislation governing Employment Tribunals. It went on to say that "however attractive that line of argument may be to a purist, the cases seem to be against it. The position on the authorities is that an Employment Tribunal has a discretion in any case to allow an amendment which introduces a new claim out of time". The EAT further noted that, read out of context, the ***Selkent*** guidance might be read as implying that if a fresh claim would be out of time, and time is not extended, then the application to amend must be refused, but then said that this was not what ***Selkent*** had decided. "The reason why it is "essential" that a tribunal consider whether the fresh claim in question is in time is simply that it is a factor –albeit an important and potentially decisive one – in the exercise of the discretion". The EAT said that the authorities, including ***British Newspaper Printing Corporation (North) Limited v Kelly*** **[1989] IRLR 222** in the Court of appeal, were consistently to the above effect, save for ***Harvey v Port of London (Tilbury) Limited*** **[1999] ICR 1030**. In ***Kelly*** the original claim had evidently been intended to be for redundancy payments, and the claim sought to be added out of time was for unfair dismissal. The Court of Appeal agreed with the EAT that the tribunal at first instance had given undue emphasis to the time limit, and that the amendment should be allowed. In ***Harvey*** the original claim was for unfair dismissal and the claim sought to be added out of time was for disability discrimination. The EAT held that the fact that the claim was out of time was not merely an important factor for the exercise of discretion but was an absolute bar to the amendment. It acknowledged that this appeared to be inconsistent with ***Kelly***, but criticised the reasoning in that case, and purported to distinguish it, chiefly on the basis that the "just and equitable" test for extending time for a discrimination claim was different from the "reasonably practicable" test for unfair dismissal. In ***T&GWU v Safeway*** the EAT doubted whether it was possible to distinguish ***Kelly***. Since ***T&GWU v Safeway*** is the more recent EAT authority, it is submitted that (so far as it conflicts with the decision in ***Kelly***) a tribunal at first instance should follow it.

24 ***Timing of Applications to Amend***

(a) It should be noted that the tribunal Rules in force at the time of ***Selkent*** did not prescribe a time for applications to amend (or for interim applications generally). Subsequent Rules (including those of 2004) did prescribe a time but Rule 30 of the 2013 Rules does not.

(b) If a party considers that an application to amend should be made to add a new cause of action, even as late as during the hearing, it is right to make that application, since otherwise the opportunity to raise the claim may be lost entirely: ***Divine-Borty v Brent LBC*** **[1998] ICR 886 (CA)**: an issue estoppel case in which all three members of the Court considered that it was possible for the claimant to have applied at the hearing to amend his claim form to add race discrimination to unfair dismissal, rather than (as he did) presenting a fresh claim).

25 ***Consequences of Amendment***

It will often be possible for an amendment to be allowed and the prejudice to the other side offset by allowing further time for preparation and/or making a costs order. Indeed, in appropriate cases the Judge may only allow an amendment on condition that the party seeking it agrees to pay costs caused by it: ***Cocking v Sandhurst (Stationers) Limited*** **[1974] ICR 650**.

Discussion & Conclusions

26 The tests to be applied in relation to the two claims are different: in relation to the first claim I am considering an application to amend - applying the tribunal's case management powers and the ***Selkent*** guidance; regarding the second claim it is simply the application of the test of *reasonable practicability* which is under consideration. The amendment application, applying ***Selkent***, involves a wider test than simply the question of *reasonable practicability*: the time point is one of a number of factors to be considered - it would be wrong to refuse an amendment simply on the grounds of the time limit having expired. On the other hand, if the *reasonable practicability* test is satisfied, then the claimant would be entitled to proceed with the second claim regardless of potential prejudice to the respondent; whereas the amendment application in the first claim will also require the tribunal to consider the question of prejudice to the respondent by allowing the amendment. I propose in the first instance to determine the tribunal's jurisdiction to consider the second claim.

27 In my judgement, it is unnecessary for me to determine whose account of the conversation on 9 July 2018 is accurate. What is significant is that something in that conversation prompted the claimant and Mrs Withington to investigate the position on-line that evening. The information that they obtained from this investigation is the information which persuaded them that a claim for unfair dismissal was a viable and should be presented. What they take from their on-line investigations was that Mr Collins was described as a *Business Development Manager (Defence and Fuel)*; a role which the claimant believes duplicates his own.

28 I must decide three things: in each case the burden of proof is on the claimant: -

(a) Was it reasonable for the claimant to be unaware of Mr Collins and his role prior to 9 July 2018?
(b) Did the claimant acquire the information on 9 July 2018 reasonably? Was it fundamental, crucial, or important information?
(c) Was the information crucial and determinative to his decision to proceed with a claim for unfair dismissal?

29 My judgement is that the answer to each of these questions is in the affirmative: -

(a) The claimant has satisfied me that he had no occasion to visit the respondent's website and research their latest recruitment before his conversation with Mr Williams on 9 July 2018. He clearly had no reason to do so.
(b) Having had that conversation, his acquisition of the knowledge of Mr Collins and his role was clearly reasonable: it did not involve any illegal or underhand activity; it was information gleaned from publicly accessible sources.
(c) It clearly was crucial to his decision to proceed with a claim for unfair dismissal: this is evidenced by the speed with which he acted in giving instructions to his solicitors (which were very promptly followed) once the knowledge had been acquired.

30 In my judgement, the claimant's position is not in any way undermined by the fact that he had clearly given consideration to the possibility of an unfair dismissal claim at an earlier stage. Indeed, the fact that he had considered such a claim and decided against it strengthens his case that it was the knowledge reasonably acquired on 9 July 2018 which persuaded him to proceed.

31 In my judgement therefore, because of his reasonable lack of factual knowledge it was not reasonably practicable for the unfair dismissal claim to be presented before 9 July 2018. Further, the claim was presented at the earliest possible moment thereafter; namely, the following day. My judgement is that the claimant satisfies the test set out in Section 111(2) ERA and, accordingly, the claim is in time and the tribunal has jurisdiction to consider it.

32 So far as the amendment application is concerned, all of the ***Selkent*** consideration in this case would point towards allowing the amendment other than the implications of the time limit. In particular, the application has been made promptly; at a time before the respondent has even been served with the claim; and therefore, the respondent has not been put to any unnecessary inconvenience or cost by the addition of the unfair dismissal claim. The

considerations of the time point are identical to the considerations in relation to the second claim. Based on my findings above, the time point can be no obstacle to the amendment application.

33 Accordingly, my judgement is that the amendment should be allowed.

FUTURE CASE MANAGEMENT

34 I agreed with counsel that, once this judgement was promulgated, I would attempt to case manage the proceedings to trial without the necessity of a further Preliminary Hearing. I therefore invite the parties to proceed as follows: -

(a) By 4pm on Friday **17 May 2018**, the parties are to agree the position with regard to the second claim. As the amendment of the first claim has been allowed, it seems to me that the second claim could safely be dismissed by consent. Alternatively, it should be stayed. If the parties cannot agree the position, they should each advise the tribunal of their respective positions.
(b) By 4pm on Friday **17 May 2018**, the party should agree Case Management Orders taking the case through to trial. And they should provide details of the numbers of witnesses likely to be called and an agreed time estimate. Again, if the parties cannot agree they should state their respective positions in writing.
(c) Upon compliance with (a) and (b) above, the file shall be referred to me for case management and listing directions.

Employment Judge Gaskell
25 April 2019