EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4116423/18 Held in Aberdeen on 29 April 2019

Employment Judge: Mr N M Hosie

Mrs Henrietta Hopkins	Claimant Represented by: Mr M Allison – Solicitor
Lifescan Scotland Limited	Respondent Represented by: Mr K Tudhope – Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

1. the claimant's application to amend is allowed;

2. the claimant is ordered to provide further specification of the averments in Para 8b of the Statement of Claim, as amended, to the respondent, copied to the Tribunal, within the next 14 days; and

3. the respondent, if so advised, will send to the claimant, copied to the Tribunal, a written response to the amendment and further specification ordered, within 28 days of receipt of the further specification.

E.T. Z4 (WR)

REASONS

1. By e-mail dated 28 December 2018, the claimant's solicitor applied to amend the Statement of Claim annexed to the claim form. An "Adjusted Statement of Claim" was attached, which is referred to for its terms.

2. Due to a change in ownership of the respondent, their solicitor had difficulty taking instructions and it was not until 28 March 2019, that he was able to intimate, by e-mail to the Tribunal, that the application was opposed. His letter which was attached is referred to for its terms.

3. It was agreed that I would determine the issue by way of written submissions. By e-mail dated 11 April 2019, the claimant's solicitor made submissions in response to the respondent's objections.

Amendment of Para. 8(b)

4. By and large, I accepted the submissions in this regard by the claimant's solicitor. The amendment proposed at para. 8(b) provides further specification of the averment that, "*the Contract is void and unenforceable".*

5. Accordingly, this is allowed.

6. However, while the claimant's solicitor asserted that this further specification required to be read *"in conjunction with the existing averments which are made at paragraph 5 of the Statement of Claim",* in my view the contention by the respondent's solicitor that further specification is still necessary is well-founded.

7. As I understand it, the alleged *"request"* was made *"in or around March 2017*", but to provide "fair notice", the claimant also requires to specify who made

the request, the manner of the request and the circumstances in which it was made.

8. Accordingly, I order the claimant to provide this further specification, in writing to the respondent and at the same time copy the Tribunal, within the next 14 days.

Para. 8(c)

9. This was a minor amendment, by way of the addition of a single sentence, which explains why the claimant was inhibited due to her ill-health. This further specification does not prejudice the respondent in my view and there is no suggestion of a new cause of action being introduced.

10. Accordingly, this is allowed.

Para. 10

11. It was accepted by the claimant's solicitor that this introduces a new cause of action, namely a claim in relation to an alleged failure to make reasonable adjustments in terms of s.20 and 21 of the Equality Act 2010.

Discussion and Conclusion

12. In ***Cocking v. Sandhurst (Stationers) Ltd & Another*** [1974] ICR 650, Sir John Donaldson, when delivering the Judgment of the NRIC, laid down a general procedure for Tribunals to follow when deciding whether to allow substantial amendments. These guidelines have been approved in several subsequent cases and were re-stated in ***Selkent Bus Co. Ltd v. Moore*** [1996] ICR 836. In that case, the EAT emphasised that the Tribunal, in determining whether to grant an application to amend, must carry out a careful balancing exercise of the relevant factors, having regard to the

interests of justice and to the relative hardship that will be caused to parties by granting or refusing the amendment. Useful guidance on this issue was also given by EAT in, ***Argyll & Clyde Health Board v. Foulds & Others*** UKEATS/0009/06/RN and ***Transport & General Workers' Union v. Safeway Stores Limited*** UKEAT/0092/07/LA. In both these cases, the EAT referred, with approval, to the terms of paragraph 311.03 in section P1 of Harvey on Industrial Relations and Employment Law:-

*"(**b) Altering Existing Claims and Making New Claims [311.03]***

A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts, as the original claim; and (iii) amendments which add or substitute a wholly or new cause of action which is not connected to the original at all."

13. Valuable guidance was also provided by Mummery LJ at pages 843 and 844 in ***Selkent***:-

"……
(4) Whenever the discretion to grant an amendment is invoked the Tribunal should take into account all the 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 substituting of other labels for facts already pleaded to, to on the other hand, the making of entirely new factual allegations which change the basis of the existing claims. 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 could be extended under the

applicable statutory provisions e.g. in the case of unfair dismissal section 67 of the Employment Protection (Consolidation) Act 1978.

(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 of 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 information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative in justice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournment and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

Present Case

"Nature of the amendment"

14. This issue, in my view, was the most significant of all. It had a material bearing on my conclusion. It was of particular significance that there were no additional factual averments. The claimant's solicitor relies on existing pleaded facts already known to the respondent.

15. In my view, therefore, while this was a new cause of action it was one, *"which is linked to or arises out of the same facts, as the original claim".*

16. In support of his submissions the respondent's solicitor referred to ***Reuters Ltd v. Cole*** UKEAT/0258/17. However, in my view that case can be distinguished from the present case for, as the claimant's solicitor submitted, the application to amend in ***Reuters***, to introduce a complaint of direct discrimination in terms of s.13 of the 2010 Act, required additional, distinct facts, because of the different legal test to the existing complaint under s.15.

"Applicability of time limits"

17. While the proposed amendment was out of time as it was made out with the three-month time limit for such claims, even if it were to be established that the alleged failure to make reasonable adjustments existed at the time of the claimant's dismissal on 11 April 2018.

18. However, as the claimant's solicitor submitted, the issue of time-bar is not determinative and as Mummery LJ said in ***Selkent***, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment and, as I recorded above, the amendment does not seek to introduce any new facts in support of the new cause of action.

"The timing and manner of the application/Prejudice and hardship"

19. The lateness of the amendment application impacted upon the issue of prejudice and hardship. However, I did not consider that, in all the circumstances, this factor alone meant that the balance of hardship favoured rejecting the amendment.

20. I considered the whole surrounding circumstances and having carried out the balancing exercise in relation to the balance of hardship and injustice I was not persuaded that the amendment application should be refused. I concluded that justice required the amendment to be allowed.

21. In arriving at this view, I was mindful that the respondent will not have to carry out any additional investigations as the new cause of action is linked to the existing discrimination complaint.

22. Accordingly, the application to amend is allowed, subject to the further specification which I have ordered.

23. I further direct the respondent, if so advised, to send to the claimant, copied to the Tribunal, a written response to the amendment, including the further specification as ordered, within 28 days of receiving the further specification.

Employment Judge: **Nicol Hosie**
Date of Judgment: **07 May 2019**
Entered in the Register: **08 May 2019**
And Copied to Parties