EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case No: S/4101322/2019**

Preliminary Hearing Held at Dundee on 20 May 2019

Employment Judge: I McFatridge

10

Mrs E Miller	**Claimant** **Represented by:** **Mr Baillie** **Solicitor**
Anatune Limited	**Respondents** **Represented by:** **Mr Eadie** **Solicitor**

15

20

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application to amend the ET1 made on 26 February 2019 is
30 accepted.

REASONS

35 1. In this case the claimant submitted a claim to the Tribunal which was resisted by the respondents. The ET1 was lodged by the claimant on 30 January 2019. The effective date of termination of the claimant's employment was 1 January 2019. On 26 February the claimant's representative wrote to the Tribunal seeking to lodge further and better
40 particulars of claim. The respondents submitted their ET3 in response to the original claim on 1 March. At the time the respondents submitted their

response they had not seen the claimant's application to lodge further and better particulars. A Preliminary Hearing was subsequently held and reference is made to the Note issued following this. An open Preliminary Hearing was fixed for 20 May 2019 for the purposes of deciding whether or not to accept the further particulars lodged by the claimant on 26 February. At the hearing both parties made formal submissions.

Claimant's Submissions

2. The claimant's representative set out the history of the matter. He advised that the original application had been completed by the claimant herself. Prior to that the claimant had been represented by his firm in correspondence with the respondents. A particular difficulty was that the claimant was unable to come into the respondents' office and correspondence was by e-mail. The claimant sent a copy of her proposed ET1 to her representatives. Mr Baillie works a four day week and at that time was under significant work pressure. One of his colleagues offered to look at the ET1 and reported back to Mr Baillie that it was fine. The claimant then sent the ET1 to the Tribunal. Around 10 days after this Mr Baillie had the opportunity to sit down and look at the application. He felt that it was vague and non-specific. He also felt that it didn't deal with the question of constructive dismissal properly. He then spent some time trying to decide how he could amend it. He decided that any amendment would not be helpful and it was easier to simply revise the whole application which he then did and submitted it. It was the claimant's position that all that Mr Baillie did was reconfigure information supplied by the claimant in the original application. It was his position that there were no new or different facts pled. His purpose was to make the claimant's position clearer. He felt that it would be constructive and help focus issues between the parties. He pointed out that the parties now agreed that the legal issues were:- 1. was the claimant constructively dismissed and 2. did the respondents discriminate against the claimant in terms of the Equality Act 2010. He pointed out that the new and revised claim which he submitted was submitted within the original time limit i.e. the claimant could have lodged a stand alone claim for constructive unfair dismissal at this point and still have

been within time. It was his position that no additional information was provided. The reality was that the same facts were pled. His amendments meant that the Tribunal did not have to wade through the original ET1 and reconstruct the claim in the same way that he had done. It would take longer to hear the case and be more stressful if the application was not allowed. He accepted that the claimant had not labelled constructive dismissal but his position was that the substance of her application was around a constructive dismissal and in his view it was already in.

<u>Respondents' Submissions</u>

3. The respondents' position was that the additional particulars provided by the claimant was clearly an amendment and should not be allowed. They noted that the claimant had instructed solicitors and these solicitors had sent letters to their client in November 2018. It was clear that the original application had gone through that firm of solicitors and been endorsed by one of the solicitors in the firm. It was the respondents' position that this was significant. The respondents' position was that the amendment amounted to a substantial and significant alteration of the original claim. There was an additional claim of constructive unfair dismissal added. In the respondents' submission there was nothing in the original application with reference to constructive unfair dismissal. It was accepted that a lot of the facts pled were similar but there were no averments of breach of contract in the original ET1. It was the respondents' position that the amendment amounted to the addition of an entire new claim. With regard to the ***Selkent*** principles the respondents' position was that these militated against accepting the amendment. They pointed out that first of all this was a new claim. The box had not been ticked and no facts referring to a claim of constructive unfair dismissal could be found in the original claim form. Secondly, everything new referred to in the amended paper apart was known to the claimant's and presumably their solicitor at the time. There was nothing that happened in January that changed the situation. There was nothing to prevent it being made in the original application.

4. With regard to the balance of prejudice the respondents' position was that if the amendment were allowed there would be substantial prejudice. They would now have to deal with a claim of constructive unfair dismissal as well as the claim of sex discrimination they were originally facing. They also pointed out that the claimant would have alternative remedies if the claim was not allowed. They accepted the amended application had been lodged within the three month time limit. They pointed out that the respondents had already lodged the ET3 before they received notification that the claimant was seeking to amend.

Discussion and Decision

5. I advised the parties of my decision and my reasons at the hearing. I considered that this did amount to a substantial amendment of the claim. Whilst, with the benefit of hindsight it is possible to divine that the claimant may have had in mind a claim of constructive dismissal when she produced the ET1 my view is that anyone reading the application at the time would not have known that the claimant intended to make a claim of constructive dismissal.

6. The issue of whether or not to accept an amendment is a case management issue where I have to exercise my discretion in line with the overriding objective. As noted by both parties the case of ***Selkent Bus Company Limited v Moore [1996] ICR 836*** provides guidance as to how I should approach the exercise of my discretion.

7. As indicated above I felt that this was one of these cases where no new facts were alleged but there was a re-labelling of existing facts. I noted the timing of the application. I noted that somewhat unusually the application to amend was made within the original three month time limit. It would therefore have been open to the claimant to lodge an entirely new claim instead of seeking leave to amend and such a new claim would have been in time. Whilst I accept that the respondents are correct in saying that there was nothing to stop the claimant including a specific reference to unfair constructive dismissal in her original claim form I also note that the claimant

submitted her application to amend within a very short space of time after the original claim form had been submitted. I also note that the reason Tribunals are allowed to accept amendments and/or further particulars is that in employment cases time limits are tight and it is necessary to have some method of allowing a party to amend their pleadings. The claimant's representative had been quite frank in saying that there had been a failing within his firm but at the end of the day I did not consider that to be in any way determinative. The amendment process is there because this is the type of thing which sometimes happens.

8. Looking at the balance of prejudice it appeared to me that this very much came down in favour of allowing the amendment. The claimant has set out a clearly stateable claim of unfair constructive dismissal. As noted above it appears to me that, although this was not clear at the time, with the benefit of hindsight it is possible to say that the claimant probably intended to include this in her original claim but did not do so. If the amendment is not permitted then the claimant loses forever the right to have this claim adjudicated upon. On the other hand prejudice to the respondents is relatively slight. If the claimant had either included the claim properly in her original claim or indeed asked for the second ET1 to be treated as a new claim then the respondents would be in the same position as if the claim were allowed on amendment. All they are losing is the windfall benefit of not having a claim against them adjudicated upon by the Tribunal because of a failure by the claimant. I did not consider that the issue of alternative remedy was quite as straightforward as the respondents suggest. The claimant produced the original claim form herself. Any claim against her solicitors would involve proving that they were professionally negligent which would no doubt involve detailed consideration of the retainer which they had at the time. It would also depend on what view was eventually taken by the Tribunal hearing the case (minus the amendment). We did not consider that any of these matters would be straightforward. At the end of the day the overriding objective of the Tribunal is to do justice. It is clear to me that the interests of justice come down very firmly on allowing the amendment. I advised the parties of this at the time.

Expenses

9. In his original submission the respondents' representative indicated that if matters went against him he would be looking for expenses. Having set out my Judgment and the reasons for this in brief I reminded the respondents' representative of the terms of rule 75 and asked the respondents' representative whether he wished to continue with his application for expenses and he indicated it was being withdrawn.

Case Management

10. As I indicated I would do at the previous Preliminary Hearing I then moved on to a short case management Preliminary Hearing. The issues discussed were as follows.

Order for Production of Documents

11. At the last Preliminary Hearing I had issued an order that the "Deal Checker spreadsheet and relative supporting documentation" relating to various customers of the respondents should be produced. There is a claim for unpaid commission and it appeared to me that this information was necessary in order to deal with this. Since then the respondents had produced various documents however at the hearing on 20 May the claimant's representative indicated that it was the claimant's position that none of these documents were the "Deal Checker spreadsheet". The claimant's representative also indicated that the claimant had now produced a further e-mail in which she indicated that there may be other customers where the spreadsheet might be relevant namely King's College London, World Anti-Doping Agency lab, LGC Forensics Culham, Leicester Royal Infirmary, Wansbeck General Hospital, LGC Forensics Fordham and Analytical Services International. Further information was provided to the respondent' representative regarding this. The respondents' solicitor undertook to check the position with those instructing him and revert to the claimant's representative and the Tribunal regarding this. In the circumstances I decided that it would be appropriate to extend the time limit for complying with the order issued on 12 April 2019 to 12 June 2019. I also

considered it appropriate to amend the order so as to include the additional sales opportunities highlighted by the claimant. For ease of reference I have issued a new order incorporating these amendments.

Pension Contribution

12. The respondents had provided the claimant's representative with a document which appeared to indicate that the employer's pension contribution was 4% of salary. The document was slightly ambiguous and the claimant's representative sought confirmation from the respondents that this was indeed the correct figure. I indicated that I would make an order to the effect that if this was not the figure then the respondents should provide a note of the correct figure within 21 days. If they do not then it will be assumed that this is the correct figure.

Witnesses

13. The claimant's representative indicated he would be leading evidence from the claimant, the claimant's father and also someone who had attended the appeal as her representative. The respondents' representative indicated that he currently had three witnesses. The parties were agreed that the case should probably be listed for three days. On the basis that neither party had full witness availability I agreed that a date listing stencil would be sent out with a view to listing the case for a Final Hearing.

Mediation

14. Both parties indicated that they considered this was a case where it would be appropriate to attempt judicial mediation. I indicated I would make the usual recommendation to the Vice-President.

Employment Judge:	**Ian Mcfatridge**
Date of Judgment:	**22 May 2019**
Entered in register: and copied to parties	**22 May 2019**