



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: S/4123817/2018**

**Preliminary Hearing Held at Dundee on 20 May 2019**

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**Employment Judge McFatridge**

**Ms N Mulholland**

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**Claimant  
Represented by:  
Mr Bathgate  
Solicitor**

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**Dundee City Council**

**Respondents  
Represented by:  
Ms Geddes  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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1. The claimant's application to amend the claim dated 17 May 2019 is accepted.
2. The claimant shall pay to the respondents the costs of preparation for and attendance at the Preliminary Hearing on 20 May as the same shall be  
35 determined at a future hearing.
3. The respondents shall provide the claimant and the Tribunal with a calculation of such costs no later than 12 June 2019.
4. The respondents shall if so advised, have until 17 June 2019 to lodge further and better particulars of their response.
- 40 5. At the same time as they submit their further and better particulars the respondents shall indicate whether or not they seek a Preliminary Hearing

on strike out/deposit order and if so whether they intend to lead evidence at such a hearing.

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### REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly constructively dismissed by the respondents. The respondents submitted a response in which they denied the claim. They made various calls for additional information within their response. They also indicated that they were seeking a Preliminary Hearing in terms of Rule 37(a) for the claim to be struck out as having no reasonable prospect of success. They indicated that failing that they were seeking a deposit order in terms of Rule 39(1) on the basis that the claim had little reasonable prospect of success.
2. An Employment Judge decided that a Preliminary Hearing should be fixed to deal with the matters raised by the respondents and date listing stencils for a Preliminary Hearing were sent out on 1 March. On 17 March the hearing was fixed to take place on 20 May.
3. On 17 May 2019 at 14:58 the claimant's representative applied to lodge further and better particulars. At the outset of the hearing on 20 May I asked the parties to set out their respective positions.
4. The respondents' position was that there was a possibility that the need for a Preliminary Hearing on strike out/deposit order could have been avoided had the claimant's representative submitted their further particulars at an earlier stage or indeed provided them in the original application. As it was the respondents had only received the application on Friday afternoon. The application appears to plead an entirely new set of facts relating to the grievance appeal meeting in July 2018. The respondents had not been in a position to take instructions regarding this. It was clear that the issue of whether or not to accept the further particulars should be dealt with as a

preliminary matter and that before this was done there was no point in having a hearing on strike out/deposit.

5. The claimant's representative essentially agreed that the issue of whether or not to accept the further particulars should be dealt with first. Both parties were in agreement that it would be appropriate to deal with this at the hearing on 20 May. I then invited representations from the claimant's representative on the issue of whether or not the further particulars should be accepted.

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### **Claimant's Representations**

6. The claimant's representative indicated that he had not intended to be controversial and saw the additional particulars as a response to the calls made in the ET3. He felt that whilst there was an expansion of matters raised in the original ET1 he believed it should be accepted. Part 5 of the paper apart related to the final straw. He believed it was just an expansion of averments that were in the original ET1. The claimant's case was about the way a restructure had affected her post and her position was that the changes proposed were a substantial departure from the terms and conditions which she had previously enjoyed as Events Team Leader. She submitted a grievance about this and the course of that grievance was narrated in the further particulars. It was the claimant's position that it did not deviate from the original application changing the basis of the claim. It was providing information in response to the various calls which were made in the ET3. With regard to the timing the claimant's representative frankly accepted that it was his fault due to pressure of business. The essential fact was that he did not see it as adding a new strand to the case. He accepted that it would have been better to send it in earlier but that it would be contrary to the overriding objective for the averments to be excluded.

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### **Respondents' Representations**

7. The respondents' submission was that the real problem was that the further and better particulars had not been submitted at the time they were asked

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for. The claimant had lodged her claim in March 2018. It was the respondents' position that all of the matters she refers to in support of her claim of unfair constructive dismissal are of some vintage. Essentially all happened in 2016. It was the respondents' position that subsequent to this the claimant had applied for a promoted post and that any matter before this did not form the basis of a claim for constructive unfair dismissal. The claimant had clearly lost her right to accept any repudiation of the contract which may have occurred. It was the respondents' position that the document was quite clearly an amendment. There were significant new facts which were not in the ET1 but should have been. The claimant had been working for 18 months from February 2017 and resigned in August 2018. There now appeared to be a suggestion that this was a last straw case because of a delay in the grievance procedure. The respondents' representative had not been in a position to take any instructions as to the averments which were being made but would require to do so. She confirmed that if the amendment was accepted there was no point in proceeding with the hearing and she would require to investigate the new factual averments before the respondents could determine their final position on the matter. She certainly considered that in those circumstances it would be appropriate for the claimant to pay the expenses of preparing for and attending at today's hearing.

### **Claimant's Response**

8. The claimant's representative indicated that he considered that in the circumstances he could not properly oppose the application for expenses. At the end of the day it was a question of the interests of justice and the overriding objective.

### **Discussion and Decision**

9. I advised the parties of my decision on the day. I considered that this was an application to amend since there were significant new facts in the further and better particulars which were not contained in the original application. There was no reason that they could not have been in the original ET1 as I

saw matters. The claimant had been represented from the outset. The issues regarding the timescale had been pointed out in the ET3 and indeed significant calls had been made in the ET3. It appeared to me that the claimant had had ample opportunity to decide to submit further and better particulars in order to deal with these issues. The respondents' criticism of the original pleadings was clearly set out in their ET3. A Preliminary Hearing had been fixed in order to deal with the matter. In my view it was unreasonable in the extreme for the claimant to delay until the Friday before the hearing to submit further and better particulars. The above having been said the issue of whether or not to accept an application to amend is a matter for my discretion. I am required to exercise my discretion in terms of the overriding objective. As both parties are aware there is also guidance given to Tribunals as to how to exercise their discretion in the case of **Selkent Bus Company Limited v Moore [1996] ICR 836EAT**. I consider that the nature of the amendment is the addition of factual details to an existing allegation. It is not changing the basis of the existing claim. I note that the existing claim was made within the statutory time limit and the Tribunal has jurisdiction. I have already noted above my position regarding the timing of the application to amend. With regard to the balance of hardship I consider that this does, on balance, favour the granting of the amendment. The claimant considers that she has a valid claim of unfair constructive dismissal. If the amendment is not permitted then there is a good chance that, for the reasons set out by the respondents in their ET3, the claim would be struck out or a deposit order made. I have no doubt that it was the claimant's representative belatedly realising the deficiencies in the pleaded case that prompted the application to amend. If the amendment is not allowed then the claimant will be severely prejudiced and on the assumption that what she is pleading is factually correct she will not be permitted to adduce facts which might be helpful to her case. It should be noted I say "might be" in that clearly any Tribunal hearing the claim will have to make up its own mind on the issue. On the other hand if the amendment is not allowed the respondents simply lose the windfall benefit of being able to prevent the claimant being able to put forward parts of her case which she now somewhat belatedly considers to be relevant. It is therefore my view that, without in any way wishing to give the impression I

consider the actions of the claimant's solicitors to be acceptable, the interests of justice favour allowing the claimant's amendment. The amendment will therefore be allowed.

5 **Expenses**

10. The respondents' representative sought the expenses of the preparation for and attendance at today's hearing. I consider that this application is well founded in terms of Rule 75. I indicated to the parties that I would prefer to make an order for payment of a specific sum and I ordered the respondents' representative to provide their calculation of the appropriate sum within 21 days. Unless parties reach prior agreement the precise terms of the expenses order will be determined at a future hearing.

15 **Future Procedure**

11. The respondents' representative indicated that she would wish to take instructions on the additional factual averments and speak to the witnesses. She requested a period of 28 days within which to submit further and better particulars of the response on the back of this. I agreed to proceed in this manner. The respondents' representative also indicated that she, having spoken to the witnesses it may well be the case that the respondents wish to continue in their contention that the claim should be struck out and/or that a deposit order should be made. I asked the respondents to advise the Tribunal whether or not they wish to make such an application at the same time as they submit their further and better particulars. There was a short discussion regarding whether evidence could be led at such a hearing. I indicated to the parties that my view was that there were occasions when the leading of some evidence in short compass regarding a specific point which one party considered to be a "knockout blow" could be possible in particular where, as here, a deposit order was being sought as well as strike out. On the other hand the Tribunal would wish to avoid the situation of risking a substantial three or four day hearing on strike out followed perhaps by another substantial hearing lasting several days where the same evidence is gone over again. For this reason I asked that if the respondents

do make a request for a further hearing on strike out/deposit they indicate in this whether they intend to lead evidence and if so what.

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35 **Employment Judge:  
Date of Judgment:  
Entered in register:  
and copied to parties**

**Ian McFatridge  
23 May 2019  
23 May 2019**