**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4112734/18**

**Held at Aberdeen on 3 July 2019**

**Employment Judge J Hendry**

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| **Mr Waldemark Zak** | **Claimant**<br>**Represented by:**<br>**Mr M Romowicz**<br>**Solicitor** |
| **Deeside (Guernsey) Ltd** | **Respondents**<br>**Represented by:**<br>**Ms Fiona Herrell – Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

1. **The claimant's application to amend the claim to one of unfair dismissal and arrears of standby pay is granted.**

2. **The application for strike out is refused.**

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

1. An application for strike-out was made by the respondents' solicitors in relation to this case. In order to understand the background, I will recount the history. As the respondents have done I will refer to the claim raised under case no. 4112734/18 as the "Existing Claim". There is also an application to amend made by the claimant's representatives which requires to be addressed.

**History**

2. The claimant, who is Polish, raised a claim against Deeside (Guernsey) Ltd on 23 July 2018. The claimant is a seaman by trade and had latterly been assigned to work for the company Vroom Offshore Services Ltd.

3. The claimant narrates that on the 8 June he was told by a Crewing Superviser from Vroom Offshore Services to join a vessel the "Vos Inspirer". He agreed to do this and made travel arrangements. He was then told that as his work activities were restricted for medical reasons the assignment to the vessel had to be terminated.

4. The claimant did not "tick" any of the boxes indicating that he was making a claim for unfair dismissal or discrimination but rather a claim for "failure to be paid the minimum wage". The respondents submitted a Response Form (ET3). They agreed with the dates of employment which had been given by the claimant namely that he had started work on 26 July 2004 and that his employment was continuing. The Response which was detailed was summarised as follows:

> "Summary 1
>
> The claimant's claim was lacking in specification. The respondent will request further and better particulars and will seek leave to amend these Grounds of Resistance upon receipt of the same.
>
> Summary 2

It is denied that the respondents failed to pay the claimant the national minimum wage as alleged or at all and it is further denied that the respondent has made any unlawful deduction from the claimant's wages contrary to section 13 of the Employment Rights Act 1996 as alleged or at all.

Summary 3

It is denied that the claimant has been unfairly dismissed contrary to section 94 of the Employment Rights Act 1996 as alleged or at all.

Summary 4

It is denied that the respondent had unlawfully discriminated against the claimant as alleged or at all.

Summary 5

It is denied that the claimant suffered any detriment and/or been dismissed by the respondent because he has made a protected disclosure as alleged or at all.

Summary 6

Save as set out below no admissions are made in relation to the ET1 the claim form submitted by the claimant."

5. The ET3 went on to explain that the claimant was still and employee but was on unpaid leave with effect from 1 July 2018. He had a restriction in his work activities as confirmed by his most recent medical certificate which was that he could not work on fast, light motorboats for a period of 12 months from 16 February 2018 following an accident at work in May 2014. The respondents noted that the claimant had brought a personal injury claim in respect of the injury at work and sought damages for future losses. The claim had been concluded in May 2017.

6. The respondents had conceded that the Tribunal had jurisdiction and reserved the question of jurisdiction. The ET3 at paragraph 10.1 reiterated that the claimant had not been dismissed.

7. A preliminary hearing took place by telephone conference call on 1 November 2018. At that point Mr Zak was unrepresented. I noted at paragraph 2 of my subsequent Note:

> *"At the outset I raised with Mr Zak the nature of his claims. I had read the ET1 but other than a claim for non-payment of minimum wage which was not at all detailed I could not discern his claim(s) was for. I decided therefore to discuss the background in order that I had a better understanding of the situation. Mr Zak is a seaman. He had a bad injury at work on 1 May 2014 and had a long recuperative process. He was off work for some time. His claim for personal injury was settled by the respondents or more than likely insurers. It appears he still has residual problems. He also had spinal difficulties which led to surgery unconnected with the accident. His position is that although still employed by the respondents he has been unfit to return to full duties. He has in the past few months been certified as been able to go back to restricted duties but he is debarred (and he accepted this) from working in/with power boats."*

8. The respondent's factual position was that he was asked to join a vessel (in other words asked to come back to work at sea for the first time since his accident) in June 2018. Preparations were made for him to board the vessel the 'VOS Inspire' but it was discovered that there was going to be a change of crew at sea and given the restrictions contained in the claimant's medical certificate he could not take part in the transfer at sea using a small boat. His assignment to the ship 'Vos Inspire', was therefore cancelled. The claimant had been able to work on non-ship duties prior to being asked to board the ship.

9. The claimant had been annoyed and upset at the situation that had arisen. He was finding it very difficult to support his family. He was not in receipt of any sick pay.

10. The respondents suggested that the claimant had recently advised them that he had lost trust in them and didn't want to return to work for them anyway. The respondents reiterated that they had not dismissed the claimant and were prepared to look at options for his redeployment but his restricted

medical certificate had to be taken account. The claimant was given 28 days to consider his position and urged to take legal advice in relation to his claims.

11. The claimant did not respond following the Preliminary Hearing and as a consequence the Tribunal wrote to him on the 18 January advising him that the Tribunal was considering striking out his claim on the grounds that it was not being actively pursued. This seems to have prompted the claimant to instruct solicitors in Poland. They wrote to the respondents on 24 January 2019 resigning. The reason given by them was that his employers had failed to find him alternative work. A claim was also made for arrears of standby pay.

12. By letter dated 25 January the claimant's solicitors also wrote to the Tribunal responding to the Tribunal's order a strike-out warning. The Polish solicitors made representations to the Tribunal on the claimant's behalf. They did not explain the delay but in those representations, they set out in more detail the claimant's position in relation to a claim for unfair dismissal and the standby pay which they alleged was due to him in terms of an agreement with the respondents and making representations on his behalf in relation to the strike out warning. Representations were also made about a right to a redundancy payment and exemption for payment of fees which subsequently were not pursued.

13. The respondent's solicitors e-mailed the Tribunal on 19 February. In summary, their position was that the existing claim should be struck out on the basis that the claimant no longer wanted to pursue it. The claimant should submit a new ET1 if he wanted to pursue claims for unfair dismissal and standby pay. In response the claimant's solicitors e-mailed the Tribunal on 13 March. Their position was that there was new evidence they wanted to put forward supplementing the existing claim. The claimant wanted to pursue the existing claim on this new basis. In other words, an amendment was sought. They stated:

*"As new circumstances appeared on the subject case, the existing claim should not be struck out but should be supplemented instead*."

They then set out the factual background that was being relied on.

14. The Tribunal arranged a further preliminary hearing to take place by telephone conference call. The respondents e-mailed the Tribunal on 8 April providing detailed comments on the claimant's solicitor's letter of 13 March. Their position remained unaltered and they insisted on strike-out. They submitted that the claimant's solicitors had failed to address the Tribunal on the issues that required to take into account considering an application to amend. The claimant's solicitor had not addressed what disadvantages the claimant would suffer and why he would have to raise a brand new claim with the Employment Tribunal in respect of the new claims he wished to pursue. The claimant's solicitor had also failed to provide a revised draft ET1 showing the amendments and accordingly a correct application to amend has not been made.

15. Prior to the preliminary hearing parties agreed that the strike-out application could be dealt with by way of written responses. Parties summarised their respective positions. The respondents by letter dated 27 May 2019 and the claimants on 27 May 2019.

**Discussion and Decision**

16. It is helpful to consider the issue of strike out at the outset although this is interconnected with the issue of amendment. The legal rules and principles that apply are as follows.

17. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides that:

***"37. Striking out***

***(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -***

***(a) that it is scandalous or vexatious or has no reasonable prospect of success;***

***…"***

18. It has been recognised that striking out is a draconian power that must be exercised carefully. The Tribunal can strike out a claim in whole or in part. If exercised it would prevent a party from having that claim determined by a Tribunal. The power must be exercised in accordance with reason, relevance, principle and justice (**Williams v Real Care Agency Ltd (2012)** ICR D 27, EAT).

19. The grounds on which the strike out is sought by the respondents was initially that the claim was not being actively pursued and also that the ET1 did not identify any proper basis for a claim. However, it is apparent that Mr Zak was not clear whether his employment was continuing. He seemingly had heard nothing from the respondents for some time and he was not in receipt of sick pay or any other payment from the respondent. The respondents confirmed that he was still in employment.

20. The issue of strike out is bound up with the application to amend. Although the claimant has been tardy in his dealings with the Tribunal he has now instructed solicitors and they will almost certainly be more mindful of any time limits contained in Tribunal Orders in the future. The delays whilst regrettable have not been substantial nor have they resulted in any material prejudice to the respondents.

21. The criticisms made of the ET1 is well founded and if the ET1 stood in isolation by itself a strike out application on prospects would be well founded. However, the Tribunal has to have regard to the fact that it was prepared

without legal assistance by a foreign national in a situation where his employment status and rights were not clear cut for him as an individual to assess. He eventually sought legal assistance and his lawyers have indicated that claims would be pursued on a different basis now the claimant had a fuller undertsnading of both the law and the factual position. It was open to them to raise new proceedings but it is apparent from the letter dated 25 January that they believed that fees were still part of the Tribunal process as they are commonly in other court processes. They were also aware that the Existing claim could be amended and took this course of action having identified a possible right to standby payments and to unfair constructive dismissal.

22. The danger in this course of action was that the claimant had an unrestricted right to raise new proceedings once concluding the early conciliation process to raise new claims but that the amendment of the Existing claim was a matter for the discretion of the Tribunal and might not be allowed. It is apparent that the risk in this approach is that the claimant's ability to raise these new claims may now be time barred although a civil court might still have jurisdiction to hear a claim for payment or damages as different limitation periods apply.

23. The well-known case of **Selkent Bus Company Ltd v. Moore** [ICR 1996 836] sets guidance in relation to the exercise of their discretion. It is recognised that every case turns on its own facts. The Tribunal has wide powers of amendment even if a claim is out of time. It is worth quoting these principles as set out by Mummery J in that case:

"*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 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 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 should be extended under the applicable statutory provisions eg, in the case of unfair dismissal, S.67 of the 1978 Act.*

*(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 Rules 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 new information appearing from documents disclosed on discovery. 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, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.*"

24. The Tribunal has wide powers of amendment. I can see no prejudice to the respondents in that they are facing claims that could properly have been made, without restriction, in another way. The claimant, however, would be severely prejudiced. He would completely lose his right to make a claim for unfair dismissal. Any claim for standby payments would have to be made in the Sheriff Court with the attendant fees that apply there and the expenses regime that applies in the civil courts rather than in the Tribunal system which was designed to allow easy access to justice and a simple process for adjudicating on employment related claims.

25. While the situation that has developed is not entirely satisfactory I have come to the view that in these circumstances weighting the balance of prejudice as I have found it the allowance of the amendment is in the interests of justice.

26. The Respondents solicitors also criticised the manner in which the amendment was set out and suggested that a recast ET1 would have been the most appropriate way to proceed. I agree that this would have been preferable but some allowance has to be made for the claimant's solicitors operating in what is to them a foreign system. The principal issue must be whether proper notice is given of the new issues and I accept that there is sufficient notice both of the claim for unfair dismissal and standby payments although greater specification will have to be given in the pleadings. This is a matter that can be discussed during a case management hearing which will be the next procedural step.

**Employment Judge:** **James Hendry**
**Date of Judgment:** **03 July 2019**
**Date sent to Parties:** **04 July 2019**

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