EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102063/2019 & 4102064/2019

Held in Glasgow on 11 April 2019

Employment Judge: Rory McPherson

Mr J Queen	**First Claimant** **Represented by:** **M Allison - Solicitor**
Mr HG Haddow	**Second Claimant** **Represented by:** **- see above**
SSE Contracting Ltd	**Respondent** **Represented by:** **L McDonald - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that;

1. the respondent's application for reconsideration of the Tribunal's acceptance of the ET1 for Mr Queen is refused; and

2. the respondent's application for reconsideration of the Tribunal's acceptance of the ET1 for Mr Haddow's claim is refused; and

3. The respondent's application to treat Mr Haddow's claim as not being compliant with Rule 9 of the 2013 Rules is refused; and

The Tribunal orders that;

4. Mr Queen's claim is amended in terms of the claimants' Joint Paper Apart

5. Mr Haddow's claim is amended in terms of the claimants' Joint Paper Apart;

6. Following initial consideration of the claims and responses under Rule 26 of the 2013 Rules, the claims shall be listed for a hearing on time bar.

REASONS

Introduction

Preliminary Procedure

1. This hearing was appointed a Preliminary Hearing to consider the respondent's application for reconsideration of the Tribunal's acceptance of both claimant's claims, together with the respondents' objection to the claimants' Joint Paper Apart being treated either as Further and Better Particulars or as Amendment of the claimants' claims.

2. There were no witnesses at this Preliminary Hearing, however the Tribunal was referred to a Joint Agreed Bundle of Documents. The Tribunal also to note of the Tribunal's own records.

Findings in fact

3. While no witness evidence was led, a number of factual findings are considered appropriate from the agreed joint bundle documentation provided in respect of which no material issue was taken as to the accuracy of same, together with the Tribunal's own records.

4. The ET1 identified an address, date of birth, and an employer for the first named claimant. An ACAS Early Conciliation certificate number was provided at 2.3 of the ET1. No start or end date of employment was provided at 5.1 of the ET1.

5. The online application for multiple claimants provided that "*the following claimants are represented by (if applicable) and the relevant required information for all the additional claimants is the same as stated in the main claim of John Queen v SSE plc… 1.1. Title: Mr… 1.2 First Names: Graeme… 1.3: Haddow"* it also provided both a date of birth and an address for Graeme Haddow.

6. The respondent is SSE Contracting Ltd.

7. The ET1 at page 15 Additional Information provided "Early Conciliation no for Graeme Haddow – R352718/18/60"

8. In the ET1 at 8.1 identified that the type of claim was one of unfair dismissal including constructive dismissal. No other box was ticked.

9. No paper apart was attached. The absence of a Joint Paper Apart for both claimants (the claimants Paper Apart) is identifiable from the e-mail response from the Tribunal on 7 February 2019 which stated "*John Queen Thank you for submitting your claim to an employment tribunal…. Additional documents: None"*.

10. The ET1 was presented in respect of both the first and second named claimant on 7 February 2019.

11. The claim was not referred to an Employment Tribunal Judge by the staff of the Tribunal office.

12. On 14 February 2019 the Tribunal wrote to the respondents with a letter which stated *"1. The Employment Tribunal has accepted a claim against you by J Queen."*

13. On 22 February 2019 the respondents' agent e-mailed the claimants agent *"I understand you are acting on behalf of the Claimant in the above claim, we have been instructed by the Respondent. We don't appear to have received a full copy of the ET1 and should be grateful if you would forward a copy of your correspondence to the Tribunal submitting to the ET1 to me today if possible."*

14. On 22 February 2019 the claimants' agents e-mailed the Tribunal enclosing a PDF of the ET1 John Queen *"I note we have only received acceptance of the claim for John Queen, despite the ET1 including a claim for Graeme Haddow. Both claims are against"* the respondent *"Can you confirm that this claim has been accepted?".*

15. On 26 February 2019 the Tribunal emailed the claimants' agent with an e-mail heading "*4102063/19 & 4102063/19"* and stated "*I refer to the above named proceedings and your e-mail dated 22 February 2019. I can confirm that two claimants were accepted against"* the respondent *"under the above mentioned case numbers. … For the avoidance of doubt both claims have been accepted and served on the Respondent."*

16. On 26 February 2019 the claimants' agent recorded a note of telephone discussion with the respondent agent identifying that there was a joint claim, and agreed to provide the paper part and the case numbers for both claimants. The claimant's agents thereafter e-mailed the respondents agent on 26 February 2019 *"Please see paper attached the paper apart for John Queen and Graeme Haddow's joint ET1 as discussed. Please note that the claim no for John Queen is 4102063/2019 and Graeme Haddow is 4102064/2092".* The paper apart attached consisted of 7 paragraphs and referred to both claimants. The claimants' Joint Paper Apart identified what each claimant asserted were their respective start and end dates, which is said to be 10 September 2018 together with their respective job titles and description of their work activities including an assertion that both roles involved travelling to and from work in what was described as tracked van. Both claimants asserted that they did not receive full payment of their overtime hours. Both claimants asserted that in January 2018 there was a change in the line manager and identified the individual who they say became their line manager. Both claimants made allegations around the management style of the new line manager. Both claimants assert that the respondent conduct formed repudiatory breaches of contract and the treatment by the new line manager breached the implied term of trust and confidence and pursued an agenda to their detriment by refusing to engage with them personally and by reducing the wages unlawfully.

17. Prior to Initial Consideration under Rule 26 of the 2013 Rules taking place, and on 28 February 2019, the respondent's agent submitted an application for reconsideration under Rule 71 of the 2013 Rules of what they described as the decision of the Tribunal on 7 February 2019 to accept the claim for

John Queen, and, *"to the extent that a valid claim has also been submitted for Graeme Haddow*". The application set out the respondents' position.

18. On 8 March 2019 the claimants' agent e-mailed both the tribunal and respondent's agent "*We have received confirmation that both the ET1 claim forms for John Queen and Graeme Haddow have been accepted. Notwithstanding, we are also advised that the Tribunal does not have the papers apart for John Queen and Graeme Haddow … It is our understanding that the statement of claim in each case was uploaded to the ET1 claim form. The suggestion that these were not successfully attached (if that is now the suggestion) was not a matter of which we were aware at the time of submission and did not become aware of this until communication was received from the tribunal to that effect … The respondent has already now been provided with the attached statement of claim, a copy of which attached… In the circumstances… it seems to us appropriate that the paper apart is simply received as voluntary further and better particulars of the claim".* That paper apart attached consisted of 7 paragraphs but referred to only John Queen.

19. The respondent's agent sought an extension the time within which to present an ET3 response for both claims**.**

20. On 13 March 2019 the Tribunal, in response to the respondent's agent's application, extended the time within which to present a response for both claims until 28 March 2019.

21. On 17 March 2019, the Tribunal appointed this Preliminary Hearing to take place on 11 April 2019 to determine "*the application made by the respondent's representative on 28 February 2019".*

22. On 28 March 2019 the respondents' agent e-mailed the Tribunal and the claimants agent provided an ET3 in respect of each claimant setting out their response and at 6.1 stated *"Please see paper apart for full grounds of resistance*" and provided a Paper Apart for each and which;

a. for Mr Queen identified what the respondent will argue is the correct and relevant factual matrix in respect of the first claimant's claim commencing at para 1.5 to 4.3 including; what is said to be the start and end date of employment which is said to be 7 September 2018, the first claimant's job title together with allegations relating to the actings of both the first and second claimant with a consequential investigation by the respondent in August 2018 and quoting from an alleged letter of resignation from first claimant dated 3 September 2018. The respondent further set out their analysis in respect of claim of Unfair Dismissal at 5.1 to 5.7.3 setting out that the *"Notwithstanding the Respondent's primary position as set out at paragraph 1 above, the Respondent denies that the claimant was unfairly, constructively or otherwise. The claimant resigned voluntarily and was not dismissed, as alleged or at all."*. The respondent at para 6 of their specific paper apart to Queen's claim set out that the respondent *"reserves the right to amend its response in relation to any further and better particulars accepted by the Tribunal in relation to the Claimant's claim."*

b. for Mr Haddow identified what the respondent will argue is the correct and relevant factual matrix in respect of the second claimant's claim commencing at para 1.7 to 4.3 including; what is said to be the start and end date of employment which is said to be 7 September 2018, the second claimant's job title together with allegations relating to the actings of both the first and second claimant with a consequential investigation by the respondent in August 2018 and quoting from an alleged letter of resignation from second claimant dated 3 September 2018. The respondent further set out their analysis in respect of claim of Unfair Dismissal at 5.1 to 5.7.3 setting out that the *"Notwithstanding the Respondent's primary position as set out at paragraph 1 above, the Respondent denies that the claimant was unfairly, constructively or otherwise. The claimant resigned voluntarily and was not dismissed, as alleged or at all."*. The respondent at para 6 of their specific paper apart to Haddow's claim set out that the respondent *"reserves the right to amend its response in relation to any further and better particulars accepted by the Tribunal in relation to the Claimant's claim."*.

Submissions

23. The respondent confirmed that the correct designation of the respondent is SSE Contracting Ltd and no issue is taken in relation to that issue.

24. Both the respondent and claimant provided oral submissions, supplemented with reference to extract copy authorities including ***C Fforde v S Black*** EAT/68/80 (***Fforde***), ***Selkent Bus Company v Moore*** [1996] 661 (***Selkent***), extracts of the IDS Employment Law Handbook; ***Chandhok and Another v Tirkey*** [2015] IRLR 195 (***Chandhok***); ***Secretary of State for Business, Energy and Industrial Strategy v Parry and the Trustees of the William Jones's School Foundation*** [2018] EWCA Civ 672 (***Parry***); & ***Brierley v ASDA Stores Ltd*** [2019] EWCA Civ 8 (***Brierley***) . For ease I have separately summarised the parties' respective positions in relation to Reconsideration, Multiple Claims, the claimant's Joint Paper Apart and Further Procedure.

Reconsideration

25. For the respondent it was argued that the acceptance of the claim form ET1 ought to be subject to reconsideration, the ET1 contains no details of the claim, no paper apart was attached and it was now apparent (though only from the claimants' Joint Paper Apart which the respondent asserts should not be treated as Further and Better Particulars) that the claims asserted were of constructive dismissal rather than more straightforward unfair dismissal. The respondent argues that on the basis of the information contained within the ET1, they could not reasonably be expected to know the basis or detail of such claims in order to provide a response. The respondent argued that the claims could not be sensibly responded to and this identifies the basis on which the claims ought to have been rejected when presented, referring to Rule 12 (1) (b). The respondent argued that while the existing case of ***Parry*** referred to in the IDS extract had some similarity it was distinguishable on the facts from the present case as that was one of unfair dismissal by reason of redundancy of which, it was argued, that respondent could reasonably be said to have had knowledge. The respondent argues that it would be in the interest of justice to reconsider in terms of Rule 70 of the 2013 Rules and revoke what

the respondents argue was a decision to wrongly accept the claims. The respondent argues that such reconsideration would be in accordance with the overriding objective.

26. The claimants' position on Reconsideration was that, reconsideration could only arise in respect of a "judgment". The acceptance by the Tribunal of the two claims did not, say the claimants, amount to a judgment and thus no opportunity for reconsideration can arise. The claimants relied on ***Parry*** as supporting their position. In so far as the overriding objective arise, it being their position that the acceptance by the Tribunal was not a judgment and thus not justiciable by reconsideration, the claimants argued that the correct application of the overriding objective was any reconsideration, on the facts, would in this case not result in the claims being effectively struck out as that would not be in accordance with the overriding objective.

Multiple Claim Form

27. The respondents argue that a separate ET1 claim form ought to have been used for the claim of Graeme Haddow. The Respondent argued that Mr Haddow's claim could not be based on the same set of facts as Mr Queen and this amounts to a breach of Rule 9 of the 2013 Rules and thus Mr Haddow's claim ought to be struck out and/or his participation in any proceedings barred under Rule 6 of the 2013 Rules. The claimants argued that on the facts of this case, including having regard to the claimants' Joint Paper Apart which both the Tribunal and the respondents were in receipt of at the time of the hearing, the facts are sufficiently similar for the two claims to have been submitted together as a multiple claim.

The claimants' Joint Paper Apart

28. The respondents argued that the claimants' Joint Paper Apart should only be considered as amendment and should not be accepted in any event reflecting the principles set out in ***Selkent***. The respondent argued that the claimants Joint Paper Apart should not be accepted as Further and Better Particulars, they were not included with the ET1 when was presented. The claimants argue that the claimants' Joint Paper Apart identifying both claimants are

simply Further and Better particulars and it is unnecessary to consider in terms of a formal amendment procedure.

Further procedure

29. Finally, both parties indicated that whatever the outcome of this hearing, a separate Preliminary Hearing at which evidence may be required would be require to be appointed on time bar. The respondents will argue at that hearing that both claims were presented out of time in terms of Section 111 of the Employment Rights Act 1996 which provides that a claim for unfair dismissal must be presented before the end of the period of three months beginning with the effective date of termination, or, if it is not reasonably practicable to present the claim within that time limit, within such further period as the Tribunal considers reasonable.

Relevant Law

The 2013 Rules

30. Rule 2 of the 2013 Rules sets out that:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

31. Rule 6 of the 2013 Rules provides "*A failure to comply with any of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal … does not of itself render void the proceedings or any step in the proceedings. In the case of such non- compliance, the Tribunal may take such action as it considers just, which may include all or any of the following-*

(a) waiving or varying the requirement;
(b) striking out the claim or response…
(c) barring or restricting a party's participation in the proceedings;
(d) awarding costs in accordance with rule 74 to 84."

32. Rule 8 of the 2013 Rules provides that "*A claim shall be started by presenting a completed claim form (using a prescribed form)…"*

33. Rule 9 of the 2013 Rules provides *"Two or more claimants may make their claims on the same claim form if their claims are based on the same set of facts. Where two or more claimants wrong include claims on the same claim form, this shall be treated as an irregularity falling under rule 6"*

34. Rule 10 of the 2013 Rules sets out the basis on which a Tribunal may reject a claim. It is required that the prescribed form is used and that each claimant and respondents' names and addresses are provided. However, as not every claim arises from a termination, the rule does not require that the start and end date of employment is supplied.

35. Rule 12 of the 2013 Rules provides that

"(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be
(a) one which the Tribunal has no jurisdiction to consider;
(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process.
(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;

(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;

(e) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates; or

(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a) (b), (c) or (d) of paragraph (1).

(2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim.

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection".

36. Rule 26 of the 2013 Rules, provides that

"(1) As soon as possible after the acceptance of the response, the Employment Judge shall consider all of the documents held by the Tribunal in relation to the claim, to confirm whether there are arguable complaints and defences within the jurisdiction of the Tribunal (and for that purpose the Judge may order a party to provide further information).

(2) Except in a case where notice is given under rule 27 or 28, the Judge conducting the initial consideration shall make a case management order (unless made already), which may deal with the listing of a preliminary or

final hearing, and may propose judicial mediation or other forms of dispute resolution."

37. Rules 29 and 30 of the 2013 Rules provide general case management powers including the power to allow an amendment. Rule 30 identifies that an application may be made either in writing or in a hearing.

38. Rule 70 of the 2013 Rules provides '*a Tribunal may … reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.'*

39. Rule 72(1) of the 2013 Rules provides so far as is relevant: '*An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked … the application shall be refused and the Tribunal shall inform the parties of the refusal.'*

The law

Unfair Dismissal and Constructive Dismissal

40. The basis of a claim for constructive dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) provides that an employee is to be regarded as dismissed if *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

41. While neither party referred to specific authority on the approach which would be required by a Tribunal when considering a claim of constructive dismissal I have reminded myself that Langstaff J in ***Wright v North Ayrshire Council*** [2014] ICR 77 at paragraph 2 said "*that involves a tribunal looking to see whether the principles in* ***Western Excavating (ECC) v Sharp*** *[1978] IRLR 27 can be applied"* and sets out 4 issues to be determined: *"that there has been a breach of contract by the employer, that the breach is fundamental or*

is, as it has been put more recently, a breach which indicates that the employer altogether abandons and refuses to perform its side of the contract; that the employee has resigned in response to the breach, and that before doing so she has not acted so as to affirm the contract notwithstanding the breach".

The law

Reconsideration

42. In ***Parry*** a claim form had been presented on 25 January 2015, the day before the expiry of the time limit her claim for Unfair Dismissal. In that instance the wrong paper apart was attached by the claimant's solicitors. The Tribunal staff decided to refer the case to an Employment Judge who made a decision not to reject the claim on 28 January 2016. The claim was sent out and the respondents solicitors responded by arguing that it did not meet the minimum requirements of a valid claim and indicated that it should be referred to an Employment Judge as being in a form which could not sensibly be responded to and should be rejected. The claimant's solicitors wrote stating that they would be seeking to amend the claim at a preliminary hearing which had by then been listed. The respondents argued that they had in effect sought reconsideration, however the Employment Judge held at the Preliminary Hearing that an application for reconsideration was only available to a claimant (if the ET1 was rejected), not to a respondent and that the decision not to reject on 28 January 2018 was not a judgment. The respondent's appealed the decision of the Tribunal.

43. The Court of Appeal, in ***Parry*** describes the EAT's approach at para 20 to 24 dismissing the appeal and declaring that Rule 21(1) b was ultra vires.

44. While the Court of Appeal rejected the approach of the EAT in its implied declaration that Rule 12(1) (b) –(f) of the 2013 Rules was ultra vires it dismissed respondents appeal.

45. LJBean in relation to the initial rejection of the ET concludes that

"41. ... an employment tribunal's rejection of a claim pursuant to rule 12 is not a 'determination of proceedings'" thus, a rejection under Rule 12 of the 2013 Rules is not a judgment.

46. In ***Fforde*** the EAT considering an application for what was at the time described as "review" commented that *"The appellant had acted under a complete misapprehension as to the purpose and extent of the review procedure. It falls to be used exceptionally and normally in the type of case where there has been a clerical error which can be readily put right without the expense of an appeal. When … it is said that a decision may b reviewed if in the interests of justice requires such a review that does not mean, as the appellant seems to think, that in every case where a litigant is unsuccessful, he is automatically entitled to have the tribunal review it ... This ground of review only applies in the event more exceptional case where something has gone radically wrong with the procedure involving a denial of natural justice or something of that order".*

The Law

Joint Paper Apart

47. I have reminded myself that the EAT observed in ***Khetab v AGA Medical Ltd*** [2010] 10 WLUK 481 that the purpose of pleadings *"…is so that the other party and the Employment Tribunal understand the case being advanced by each party so that his opponent has a proper opportunity to meet it".*

48. I was referred to ***Chandhok*** in which Langstaff J, commented at para 18 the parties should set out the essence of their respective cases and "*… 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".*

49. In ***Parry*** Court of Appeal 2018 the ET1 presented by the former employee of a school claiming unfair dismissal and unpaid wages in January 2016, stated that the background and details of the claim were in an attachment. Through

administrative oversight a different (wrong) paper apart was attached which did not give the details of the claim. The claim was reviewed by an Employment Judge who did not reject the claim in January 2016 and the ET1 was sent to the respondent without the wrong attachment. Thus, the respondent had only the ET1 which expressly stated that details of the claim were in an attachment. The respondent on receiving the claim asked the school to reject the claim in terms of Rule 12 of the 2013 Rules. After some exchanges between the parties and the ET the claimant's agents indicated that they would be applying at a preliminary hearing in March 2016 to amend the claim.

50. I have reminded myself that the EAT in ***Ladbrokes Racing v Traynor*** UKEATS/0067/06 indicated that the precise wording to be introduced should be set out.

51. In the leading case on amendment ***Selkent***, Mummery J sets out the criteria for a Tribunal's exercise of discretion commenting that the Tribunal "*should take into account all the circumstances and should balance the injustice and hardship of refusing it".* The EAT in ***Selkent*** were considering an appeal which arose from an application to amend an existing unfair dismissal claim, where the application had been made a fortnight before the date fixed for the hearing. The amendment sought to introduce a new allegation that the dismissal related to the claimant's trade union membership or activities and was thus automatically unfair. The Tribunal had allowed the amendment but was overturned on appeal, the EAT commented that that factors which had influenced its decisions were:

> *"(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, e.g., 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."

52. In ***Chandhok*** the EAT considered an appeal by a respondent against a decision of an Employment Tribunal to allow an amendment to expand an existing 64 paragraph claim of race discrimination to include explicit reference of what the claimant asserted was "*her status in the caste system*". The respondents in the appeal contended that "caste" was not an aspect of race as defined by section 9 of Equality Act 2010. The appeal was dismissed. At para15 J Langstaff commented that the *"judge identified the claimant's case … not from what was asserted in the claim, lengthy though it was, but from material which could only have come from either her witness statement (which*

was brief) or what he was told." Although the appeal was dismissed at para 16 J Langstaff criticised this approach and expressly stated the importance of the ET1 and commented "*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 is free to be augmented by whatever parties choose to add or subtract merely on their say so. Instead, it serves not only a necessary but useful function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made….* "and at para 17 commented that Employment Tribunals were "*not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before employment tribunals does not mean those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principal by which reference to any further document (witness statement or the like) could be restricted."*

53. I have further reminded myself that in ***White v University of Manchester*** [1976] IRLR 218 EAT, J Phillips, while considering the then relevant rules concerning the power to Order Further and Better Particulars, observed that a party may be required to give Further and Better Particulars to remedy any deficiencies in the case as pleaded in order to enable the other party to know in advance reasonable details of the nature of the complaints that each side is going to make at the hearing and commented that *"We fully understand, accept and would endorse … that one of the characteristics of Industrial Tribunals is that they should be of an informal nature. It may be that there are many cases, particularly where the parties are unrepresented, or represented otherwise than by solicitor or counsel, and especially where the issues are simple, where particulars may not be necessary. We do not wish to say anything to encourage unnecessary legalism to creep into the proceedings of Industrial Tribunals; but, while that should be avoided, it*

should not be avoided at the expense of falling into a different error, namely that of doing injustice by a hearing taking place when the party who has to meet the allegations does not know in advance what those allegations are. The moral of all this is that everybody involved, whether it be solicitors, counsel, non-professional representatives, or the parties themselves where not represented, should bring to the problem commonsense and goodwill. This involves, or may involve in anything except the simplest cases, giving, when it is asked, reasonable detail about the nature of complaints which are going to be made at the Tribunal…. It is just a matter of straightforward sense. In one way or another the parties need to know the sort of thing which is going to be the subject of the hearing. Industrial Tribunals understand this very well and, for the most part, seek to ensure that it comes about. … by and large it is much better if matters of this kind can be dealt with in advance so as to prevent adjournments taking place which are time-consuming, expensive and inconvenient to all concerned."

54. I have also reminded myself that in ***Honeyrose Products Ltd v Joslin*** [1981] IRLR 80, EAT J Waterhouse while considering the then applicable rules 1(1)(c) and 4(1) of the Industrial Tribunals (Labour Relations) Regulations 1974 commented that "*it would be most unfortunate if it became the general practice for employers to make applications for further and better particulars when the nature of the employee's case is stated with reasonable clarity."* Indeed I have further reminded myself that the basic principles regarding the granting of an order requiring the production of Further and Better Particulars were summarised by Wood J in ***Byrne v Financial Times Ltd*** [1991] IRLR 417 at 419 "*General principles affecting the ordering of further and better particulars include that the parties should not be taken by surprise at the last minute; that particulars should only be ordered when necessary in order to do justice in the case or to prevent adjournment; that the order should not be oppressive; that particulars are for the purpose of identifying the issues, not for the production of the evidence; and that complicated pleadings battles should not be encouraged.'*

The law

Multiple claimants

55. I further have reminded myself that in respect of an alleged failure to comply to with Rule 9 of the 2013 Rules, the power of the Tribunal to take such action as it considers just was considered in ***Farmah v Birmingham City Council*** [2017] IRLR 785 where the EAT identified that the Tribunal does have wide discretion but should consider the (1) the seriousness of the breach; (2) whether the claimants (or, more importantly, their legal advisers) thought that their claims satisfied Rule 9 and, if so, why (and at the time this question would have included whether it was a device to avoid payment fees) ; (3) any potential prejudice to the various parties; and (4) any other relevant factors. I have reminded myself that when the case(s) went to the Court of Appeal where it is reported as ***Brierley v ASDA Stores Ltd*** [2019] EWCA Civ 8*,* this analysis was not challenged. In the Court of Appeal LJ Bean observed at para 86 *"if they are to be presented in a single claim form, the claims must be based on the same set of facts"* and at para 112 *" there is no basis for the assertion that the Rule 9 is intended to impose a new, strict standard for joining claims on a single claim form" .* At para 22 LJ Bean agreed with the analysis of EJ Pirani who had considered at first instance the unreported case of ***Hamilton v NHS Grampian*** UKEATS/0067/10/BI which concerned the predecessor to Rule 9 and in which the EAT had held that claims by Mr Hamilton and Mr Girling did not arise out of the same set of facts, as EJ Prinarni observed "*One claim was about the opportunity to earn overtime where as the others were about an entitlement to payment of certain money irrespective of whether it was linked or not. The claimants did not accuse their employers of the same wrong."*

Discussion and Decision

Reconsideration

56. Rule 10 sets out minimum information for a claim. That minimum information was provided. As the Tribunal did not refer the claims to an Employment Judge in terms of Rule 12 of the 2013 Rules, I do not require to consider the

decision which could have been reached in relation to Rule 12 (1) (b). The terms of Rule 13 of the 2013 Rules are clear that they, logically, provide a route only for a claimant to seek reconsideration of a decision to reject a claim.

57. Rule 12 provides a process under which a claim may be rejected, where Tribunal office consider that it can be said it could not be sensibly responded to. That process is described only in the context of an initial acceptance. It does not describe that in each case a judicial determination is made before acceptance. In the present case there is no indication that such a determination was made. In any event Rule 12 of the 2013 is designed to allow the party seeking to assert the claim, a route where there has been such a determination, to seek reconsideration. Rule 12 of the 2013 Rules does not provide a mechanism for a respondent to argue that either an initial acceptance was a judicial determination, when that is not what is envisaged, nor a mechanism for a respondent to argue that that it should not have been accepted.

58. Rule 70 of the 2013 Rules expressly provides that a judgment may be reconsidered "*where it is necessary and in the interests of justice to do so".* Subject to the decision in ***Parry*** it may be argued that a decision taken by a judge, to whom a claim has referred by the Employment Tribunal staff in terms of Rule 12 of the 2013 rules, may be considered to be a form of a judgement. The Court of Appeal in Parry concludes that a rejection is not judgment dismissing or determining a claim, it is merely a decision that a claim was never presented**.** In the present instance, there was no decision by an employment tribunal judge. The claim when presented was not referred by the staff of the Employment Tribunal, in Parry it may be possible to speculate that the staff were altered by the wrong attachment. It was accepted. That acceptance, similar to the position of a rejection considered by the Court of Appeal in Parry was not a judgment dismissing or determining an appeal. Thus, the provisions of Rule 70 of the 2013 Rules together with Rules 71 to 73 do not apply. Had Rule 70 of the 2013 otherwise applied it would not, in the circumstances of this case, be necessary and in the interests of justice for such reconsideration to take place. The respondent has already set out their

response, the claims are at an early stage, it would not be in the interests of justice for the matter for a request for reconsideration on the grounds set out by the respondent to be granted.

Discussion and Decision

Joint Paper Apart

59. While there was number of unfortunate events which resulted in the respondent not being initially provided with the claimants' Joint Paper Apart, the respondents were able to sensibly respond absent the claimants' Joint Paper Apart being formally considered by them. The respondents have expressly stated that their response is to the ET1 alone in each case and not to the claimants' Joint Paper Apart which expressly sets out the claimants' claims for constructive dismissal. The respondents had the claimants' Joint Paper Apart before being required to submit an ET3. In any event if, as the respondents assert, they did not have the claimants' Joint Paper Apart in a technical sense, it is apparent in this case that the respondents had sufficient information available to them, including the claimants start and end date together with detail of relevant factual matters such as the terms of the letters of resignation which has allowed the respondent to sensibly respond to the claim brought by Mr Queen and Mr Haddow. The respondents have entirely reasonably however reserved their position as to whether they wish to expand on their existing responses. It is a matter for the respondents to decide upon whether and to what extend they wish to respond to the claimants' Joint Paper Apart.

60. The respondents argue that Claimants' Joint Paper Apart ought not to be regarded as Further and Better Particulars and should be considered as an amendment to which Rules 29 and 30 of the 2013 Rules apply and thus the principles set out in ***Selkent*** above apply. The respondent argue support for their position can be derived from the EAT in ***Chandhok***.

61. Considering the terms of Rule 29 and 30 together with the application by the claimants to introduce the claimants' Joint Paper Apart, I am satisfied that the respondents had prior sight of same and the precise wording has been set

out. While expressed as Further and Better Particulars taking the respondents' approach of arguing that it should be treated as an Amendment, I consider that the document is compliant with the principals set out in ***Selkent*** above. It is a permissible amendment and indeed it is of assistance to the Tribunal and both parties in articulating each claimants' case so the respondent and the Tribunal understand the case and indeed so that the respondent has a proper opportunity to respond to same. Absent this Joint Paper Apart the Tribunal would have been minded to order the production of Further and Better Particulars. The introduction of the claimants' joint paper apart is designed to avoid the concerns expressed in ***Chandhok*** that the Tribunal and the respondent would, in effect, be expected to look elsewhere than the pled case for the claimants' case.

62. Applying the ***Selkent*** principals it cannot be said that the Claimant Apart is objectionable as amendment. The introduction of the claimants' Joint Paper Apart would fall squarely within what was described as "*the correction of clerical and typing errors, the additions of factual details to existing allegations",* it does not make a new positive case (for instance of automatic unfair dismissal) which would require fresh primary facts to be required by evidence; indeed while there are no material new grounds of claim, there is an explanation for the Joint Paper Apart having not been in the originating application, there was an oversight; further and while there is a reasonable basis upon which it could be said the claimants could face hardship in being restricted in any full hearing absent the written articulation of their unfair dismissal claims, the respondent who has already set out in their limited ET3 certain details of which it may be anticipated the claimants' will respond to, it cannot be said that at this early stage of proceedings there is equivalent hardship on the part of the respondent; and given the timing there would be no adjournment of any final hearing and no concomitant increase in (what would be probably) unrecoverable costs faced by the respondent.

Discussion and Decision

Multiple claimants

63. The respondents argue at para 1.3 of their Paper Apart to their ET3 to Mr Haddow' claim that Mr Haddow and Mr Queen's claim "*could not possibly be based on the same facts"*, it is not accepted that they could not "*possibly be based on the same facts*". While it may be argued that it may be unusual for two or more claimants claims for constructive dismissal to be based on the same facts, it is not considered impossible. In any event, and having regard to the claimants Joint Paper Apart they are, as presently set out, based on the same facts.

64. The claimants' Joint Paper Apart refers to both parties in a single document and, on the facts, set out it does not seek to introduce a new head of claim. It is not considered on the facts that it is in breach of the guidance set out in ***Selkent*** above, it articulates the basis of the claim Unfair Dismissal/Constructive Dismissal and Breach of Contract claims on which the claimant seeks to rely. It is useful having regard to the overriding objective to have the factual matrix on which each claimant wishes to rely set out in the present case, non acceptance of the paper apart would involve a level of artifice which is not consistent with the overriding objective. The respondents have it. They had the claimants' Joint Paper Apart on 26 February 2019 when it was sent by the claimants' agent to the respondent's agent.

65. On the use of the multiple claim form the position and applying the Court of Appeal's analysis in the case of ***Brierley*** above, both claimants here accuse their employer of the same wrong, having regard to the claimants' Joint Paper Apart. Further and taking the approach set out in ***Brierley*** and ***Farmah*** above considering (1) on the seriousness of any breach of Rule 9 of the 2013 Rules it is considered if there had been a breach it was towards the lower end of the scale, (2) on the basis of the claimants' Joint Paper Apart it is considered that the both the claimants and their legal advisers could reasonably have concluded that their claims satisfied Rule 9 of the 2013 rules as the factual matrix as set out in the claimants' Joint Paper Apart describes broadly the

same set of facts; and (3) in considering any potential prejudice to the various parties, I do not consider, having regard to the existing ET3's that there has any material prejudice to the respondent. However, a determination that Mr Haddow's claim should be struck out in whole or in part would create prejudice to Mr Haddow in that he would not have the opportunity to pursue a remedy of constructive dismissal against his employer. (4) Having regard to other relevant factors, it is apparent that the respondent has both a factual and legal analysis on which they seek to rely in defence of their position and which they have already started to articulate. They may choose to expand on same. It is considered, in all the circumstances, that to take a restrictive approach in relation to Haddow's claim would not be just and had I concluded in this instance that Haddow's claim was in breach of Rule 9 of the 2013 the appropriate just course of action would have been to waive and or otherwise vary the requirement in Rule 9. In summary it is considered to be in accordance with Overriding Objective, including the avoidance of unnecessary formality and seeking flexibility in the proceedings, to also allow Haddow's claim to proceed at this time as amended by the Joint Paper Apart.

Discussion and Decision

Overview and Initial Consideration and Further Procedure

66. I note the guidance by the Court of Appeal in ***Parry*** at para 31 that "*Employment tribunals should do their best not to place artificial barriers in the way of genuine claims".*

67. In this case, and prior to Initial Consideration provided for in terms of Rule 26 of the 2013 Rules, the respondent's agent submitted an application for reconsideration. The application for reconsideration having been considered it falls as this stage, for all the documents held by the Tribunal to be considered. I consider that there are arguable complaints and defences however and standing the amendment of the respective ET1's by the Joint Paper Apart I do not consider it necessary to order either of the claimants to provide further information. I do not consider it necessary to order the respondent to provide further information although I note that they had

reserved their position in relation to further information and it may be that they would wish to do so in light of this judgment.

68. The respondents observe that if their applications are rejected, a further Preliminary Hearing will be required to consider time bar. That is in my view correct.

69. While Sections 111 and 111A of the Employment Rights Act 1996 were not the subject of this Preliminary Hearing, I consider it appropriate to deal with further procedure by making a Case Management Order in terms of Rule 26 of the 2013 Rules that a subsequent Preliminary Hearing will require to determine whether the claims were presented with the relevant statutory time limit and, if not, whether the claimants can satisfy the Tribunal that it was not reasonable practicable to do so and whether the claim was presented within a reasonable time thereafter. In doing so, I recognise that the parties may wish to advance reasons for appointing separate Preliminary Hearings for each claimant however and having regarding the terms of Rule 2 of the 2013, the Overriding Objective, it is considered that should the parties wish to make such representations they should do so within 14 days of the date of judgment.

Conclusion

70. The respondent's application for reconsideration of the Tribunal's acceptance of the ET1 for Mr Queen is refused; and

71. The respondent's application for reconsideration of the Tribunal's acceptance of the ET1 for Mr Haddow's claim is refused; and

72. The respondent's application for reconsideration of the Tribunal's acceptance of the ET1 for Mr Haddow's claim is refused; and

73. The respondent's application to treat Mr Haddow's claim as not being compliant with Rule 9 of the 2013 Rules is refused; and

74. The Tribunal Orders that Mr Queen's claim is amended in terms of the claimants' Joint Paper Apart; and

75. The Tribunal Orders that Mr Haddow's claim is amended in terms of the claimants' Joint Paper Apart; and

76. The Tribunal Orders that a further Preliminary Hearing on the question of time bar in respect of both Mr Queen's and Mr Haddow's claims will be appointed on a date to be notified to the parties.

77. The Tribunal Orders that should the respondent or indeed the claimants consider that separate Preliminary Hearing dates on time bar for each claimant requires to be appointed, they should notify the Tribunal within 14 days of this date.

Employment Judge: Rory McPherson
Date of Judgment: 03 May 2019
Entered in register : 09 May 2019
and copied to parties