EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107822/19

Employment Judge J M Hendry

Mr M Kirton	**Claimant** **Represented by:** **Mr M Sellek,** **Solicitor**
Bridge Leisure Park Limited	**Respondent** **Represented by:** **Ms Moss,** **Counsel**

Judgment and Note for Parties

The Tribunal allows the claim to be amended to include a claim for victimisation under section 27 of the Equality Act 2010.

1. A preliminary hearing took place by telephone conference call on 24 September in order to discuss case management issues arising from the claim for sexual orientation discrimination raised by the claimant against his former employers.

2. The claimant had completed the ET1 himself but had in the last two weeks instructed Mr Sellek's firm to represent him. On 20 September Mr Sellek had lodged further and better particulars of the claim seeking to add a claim for victimisation. It became apparent that those instructing Ms Moss had not passed to her a copy of these better and further particulars. I briefly read

through the further and better particulars of claim and asked whether she required an adjournment to consider them. In the circumstances she felt that the matter could be appropriately dealt with without the necessity of any adjournment to take instructions we then agreed to discuss the proposed amendment.

3. Before doing so we touched on the length of the hearing. Both parties estimate that the hearing will take 3 days. The respondents reserve their right to call additional witnesses depending on whether or not the amendment is allowed. **It was accordingly agreed, a listings letter will be sent out to identify dates.** Another difficulty that arose is that very few dates are available for a hearing in Aberdeen until January and parties including Counsels availability had not been sought.

4. Mr Sellek explained that the claimant's position as set out in the ET1 was straightforward. It had not been clear to a party litigant like the claimant that he would also have a potential claim for victimisation under section 27 of the Equality Act. The claimant had made a verbal complaint about the behaviour of Mr Clappison. This was a protected disclosure. He followed that up in writing by way of a grievance. This was also a protected disclosure. As a consequence of the claimant's actions he believed that he had been subject to these detriments. These were not investigating the complaints, suspending the claimant, dismissing him and not upholding the grievance or appeal. The principal detriment was his dismissal which he believes was engineered by Mr Clappison. The first or earlier detriment was the failure to investigate his verbal complaints and the second detriment to uphold his grievance. Mr Sellek explained that the claimant had completed the ET1 himself. He had only sought legal advice two weeks ago. Given the position the solicitors ascertained that there was a claim for victimisation. This arose out of the same facts. The claimant, could not as a party litigant, he suggested be reasonably be expected to know about the statutory basis for this claim. Everything he believed flowed from the original actions of Mr

Clappison and the claimant's complaint to the employers about these incidents.

5. I noted in passing that the claim related to events in March and April 2019. The claim had been lodged on 25 July. ACAS issued a certificate on 27 June and had been notified on 28 May. The effective date of dismissal was 1 June.

6. Ms Moss' position was that the application came late in the day. There was no complaint of victimisation apparent from the ET1. The nearest the claimant came to any such suggestion was made reference to a 'witch-hunt'. This however was in reference to the disciplinary action taken by the employer. If the claimant truly felt he had been victimised as he raised concerns at some indication in the factual circumstances to that effect.

7. The claimant appears to have lodged a formal grievance on 15 April. At that point the disciplinary process was paused to consider the grievance which concluded on 2 May. The amendment is clearly out of time. Mr Sellek indicated that in his view the Tribunal should allow the amendment. The claimant was a lay person and could not be expected to understand the claim of victimisation arose out of these matters. It simply narrated the history as he had seen it of the disciplinary action.

Discussion and Decision

8. I considered the submissions I had heard. Amendment is a discretionary power. The well-known case of **Selkent Bus Co Ltd v Moore** [1996] ICR 836 which has since been affirmed by the Court of Appeal, for instance in **Hammersmith and Fulham London Borough Council v Jesuthasan** [1998] ICR 640) sets out some of the factors that the Tribunal should take into account when balancing parties competing interests and assessing what had been described as the balance of hardship in accepting or refusing the amendment.

9. In Selkent, the EAT confirmed that the Tribunal should take into account all the circumstances in coming to a conclusion. What are the relevant circumstances? The EAT considered that the following are usually relevant:

(a) The nature of the amendment – this can cover a variety of matters such as:

i) The correction of clerical and typing errors;

ii) The additions of factual details to existing allegations;

iii) The addition or substitution of other labels for facts already pleaded; or

iv) The making of entirely new factual allegations, which change the basis of the existing claim.

(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.

(c) The timing and manner of the application – it is relevant to consider why the application was not made earlier and why it is now being made: e.g. the discovery of new facts or new information appearing from documents disclosed on discovery.

10. There is no presumption that time should be extended in a case where such a claim is late (**Robertson v Bexley Community Centre** [2003] IRLR 434) The Tribunal should also assess on the evidence available to it the prospects of success of the new claim (**Bahous v Pizza Express Restaurant (Ltd)** UKEAT/0029/11/DA).In this case there was little material available but the claim seemed stateable. It was intertwined with the original claim that the dismissal was because the claimant had made complaints and raised a grievance but beyond that I could not venture.

11. The amendment seeks to introduce a new claim and I struggle with the suggestion that it is in some way a relabelling exercise. The amendment itself could be clearer and more detailed but no objection was taken on the basis that the position being taken by the claimant wasn't sufficiently clear from these papers. The amendment comes when the claim for victimisation is now out of time. The claimant's solicitor explained that the claimant was a party litigant who had completed the ET1 himself and it had only been after the instruction of his firm that this claim was identified. Once it had been identified had acted promptly lodging the application on the 20 September.

12. I noted that Counsel's argument was focussed on the amendment being out of time. However, I concluded that weight had to be given to the circumstances that the claimant appears to have completed the ET1 without legal assistance. He makes it clear that he complained about a manager's homophobic behaviour and associated this with his dismissal a couple of months later. I accept that a party litigant in his position might not realise that the whole circumstances might give rise to various individual claims. He had made ''ticks'' indicating that he was making a claim that he had been discriminated against on the grounds of his sexual orientation. Significantly in my view he used the word 'witch-hunt' and stated that the investigation 'would in no way be impartial' While this is not sufficient to constitute a relabelling exercise some elements lend themselves to the complaints of victimisation particularly the references to the way he believed his complaints and grievance would be handled.

13. I considered the balance of prejudice. I noted that no specific issue of prejudice had been alluded to by the respondents other than the generality that the claim was out of time. It seems to me that the respondents will not suffer any material prejudice if the amendment is allowed, apart from facing an otherwise time barred claim, as the evidence and likely witnesses will be almost identical to the evidence required if the original claim alone was to proceed. On the other hand, the claimant would lose forever the right to pursue an important statutory right because, as a lay person, he was unable to identify such a right from the facts and circumstances surrounding his

dismissal and the lead up to it. I also considered that there had been no significant time delay here from the initiation of proceeding and that his new solicitors had move reasonable promptly when they identified the new head of claim.

14. In these circumstances the amendment will be allowed and the respondents given 14 days to adjust their pleadings in the light of the allegation now being advanced.

Employment Judge: **James Hendry**
Date of Judgment: **07 October 2019**
Date send to parties: **08 October 2019**