Case Number: 1400138/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **SOUTHAMPTON**

BEFORE: **EMPLOYMENT JUDGE EMERTON (sitting alone)**

BETWEEN: **Mr M Tattersall**

Claimant

AND

Emmerson Transport Ltd

Respondent

ON: **23 August 2019**

APPEARANCES:

For the claimant: Mr H Robson (Solicitor)
For the respondent: Mr A Bryan (Solicitor)

JUDGMENT having been sent to the parties on 2 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Summary of the case

1. This was a case where the claimant had brought an in-time claim of unfair dismissal, incorrectly representing on the claim form that he had over two years' service (and therefore that the tribunal therefore had jurisdiction to consider the claim under section 108 of the Employment Rights Act 1996). Having resisted the claim on the facts, the respondent belatedly realised that the claimant had misrepresented his start date, and pointed out to the tribunal and the claimant that in fact the tribunal had no jurisdiction to hear the claim at all. The claimant then, in response, indicated that he wanted to make some other (rather unclear) claims. He later went to solicitors, after being given a stroke out warning by the tribunal, and his solicitors made a late application to amend. The new claims relied upon were harassment related to sexual orientation, direct discrimination, protected disclosure detriment and automatically unfair dismissal, for which a two-year qualifying period is not required.

2. At the preliminary hearing, the amendment application was refused, applying the *Selkent Bus* principles. As the only remaining claim was one which fell outside the tribunal's jurisdiction, the claim was dismissed.

Background to the hearing

3. This was a preliminary hearing, listed to be heard by telephone at 10:00am, for one hour on 23 August 2019, to hear the claimant's amendment application.

4. The background to the hearing is that on 14 January 2019, the claimant presented an in-time claim against the respondent, alleging only unfair dismissal.

5. The claimant (who was not legally represented at the time) explained in his reasonably succinct claim form that he worked as an HGV driver for the respondent from 25 June 2016 (which was incorrect) until his dismissal on 22 November 2018 (although that also appears to have been an error, as it would seem that in fact he was dismissed on 27 November 2018). He ticked only the box relating to "unfair dismissal". He made no reference to any protected characteristic or to any family member. He believed that he was unfairly dismissed whilst on sick leave. He referred to being pressured to go into work whilst on sick leave, and to bullying, to indecent pictures (without explanation) and to exchanges relating the state of his vehicle.

6. The claim was accepted and a two-day hearing listed for 7-8 November 2019, to hear the unfair dismissal claim.

7. The claim was resisted by the respondent, through Churchers Solicitors. The response explained how the claimant had been dismissed for gross misconduct on 27 November 2018. The particulars of response referred to a "campaign of harassment" by the claimant, following his dismissal, making numerous untrue allegations designed to damage the reputation and assets of the respondent and its Directors, and made a false claim for personal injury on 6 December 2018.

8. On 31 May 2019 the respondent's solicitors wrote to the tribunal, explaining that they had now identified that in fact the claimant had only been an employee since 19 July 2017, asking to amend their claim to argue that the tribunal had no jurisdiction to hear the unfair dismissal claim. [*The tribunal would observe that as this is a jurisdictional point, and the start date turns out not to be in dispute, no amendment of the response is technically required*].

9. On 11 June 2018 the claimant copied the tribunal into an email to the respondent, telling the respondent *"…As you are aware it is a misconception of less than 2yrs of service that the tribunal will not take the case on, but when there has been victimisation, indecent pictures with micks name above sent via txt, this allows for the case to go ahead*". There was no application to amend the claim. Later on the same day, at 14:22, he sent a further email to the tribunal (forwarding an email he had purportedly recently sent to the respondent's solicitors, but in fact with the wrong email address). This admitted that the claimant had "ticked the wrong box" and asked the tribunal "*Please be advised to amend the appropriate box*", but did not in fact indicate what box the claimant wished to tick. There were some rather vague references to "*victimization discrimination, name calling, indecent pictures, with micks name above, health and safety of the general public and being in control of machinery and heavy goods vehicles while on prescription morphine and other medications*"…etc .

10. In a letter from the tribunal dated 24 June 2019, the claimant was asked for his comments on the respondent's latter of 31 May 2019. The claimant did not reply.

11. On 8 July 2019 the tribunal sent the claimant a strike out warning, on the basis that he did not appear to have sufficient qualifying service to bring a claim of unfair dismissal. He was given until 15 July 2019 to give reasons why the claim should not be struck out.

12. On 15 July 2019 the claimant's newly-instructed solicitors (Warner Goodman LLP) emailed the tribunal, explaining that they had now been instructed, enclosing an application to amend, and amended particulars of claim (both dated 15 July 2019).

13. The claimant's amended draft particulars of claim confirmed that the claimant was indeed employed from 19 July 2017 to 27 November 2018 (correcting the original claim form). The particulars set out (1) a claim of harassment relating to sexual orientation, referring to the claimant's gay son, (2) a claim of direct discrimination (without referring to a protected characteristic) in relation to an alleged failure to take action in response to a grievance of 25 October 2019, (3) protected disclosure detriment, and (4) automatically unfair dismissal for making a protected disclosure.

14. The claimant's two-page letter of 15 July 2019 set out an application to amend the claim. An application was made to include the above claims. It was argued that although the claimant did not tick the "discrimination" box, he had emailed the tribunal, "requesting that the box was ticked" [*no details were provided, and the tribunal notes that that was not quite what the claimant had done on 11 June 2019*]. It was asserted that the additional claims involved relabeling facts already pleaded. It acknowledged that the claimant did not have sufficient qualifying service to bring an "ordinary" unfair dismissal claim, but the unfair dismissal should not be struck out, because the two-year time qualification did not apply to section 103A of the Employment rights Act 1996 (in relation to automatically unfair dismissal for making a protected disclosure).

15. On 19 July 2019, the respondent wrote to the tribunal, resisting the application to amend, essentially arguing that this was an opportunistic application after taking legal advice, and he should not now be permitted to bring an entirely new and out-of-time claim for different matters.

16. On 12 August 2019 the tribunal wrote to the parties, on the instructions of Employment judge Harper MBE, listing the case for a telephone preliminary hearing to deal with the claimant's amendment application.

Conduct of the preliminary hearing of 23 August 2019

17. Both representatives (as set out above) dialed in at 10:00am, and the preliminary hearing lasted for one hour and 10 minutes.

18. The judge confirmed that he had read the documents referred to above, and that there were no further documents upon which either party sought to rely. Mr Robson (of Warner Goodman LLP Solicitors) confirmed, on

behalf of the claimant, that it was accepted that as the claimant did not have the two years' qualifying service required by section 108 of the Employment Rights Act 1996, the claim under section 98 of the Act should be dismissed, as requested by the respondent. The judge agreed to do this, but as a matter of procedure also made it clear that he would hear the amendment application first.

19. Mr Robson did not seek to adduce any evidence from the claimant concerning the delay in making the application, or why the original claim did not contain the matters relied upon. Neither did he request a postponement so that such evidence could be heard at a preliminary hearing in person.

20. Mr Robson confirmed that he wished to pursue the amendment application. The judge asked him to confirm details of the email relied upon as requesting "that the box was ticked". Mr Bryan (of Churchers Solicitors LLP) for the respondent, confirmed that the respondent had not been copied at the time on the alleged email. Mr Robson identified the email of 14:22 on 11 June 2019, which the judge located and read out to Mr Bryan. The judge invited oral submissions, advising the parties that he would consider the matter in the light of the guidance in ***Selkent Bus***.

21. Mr Robson then went on and made oral submissions in favour of the amendment, and Mr Bryan responded, opposing the amendment. The judge took a note of both submissions, and had already carefully read the written submissions in advance of the preliminary hearing.

22. After a short adjournment, the judge ruled that the application to amend the claim be refused, giving full oral reasons. He also ruled, by agreement, that the existing unfair dismissal claim be dismissed for want of jurisdiction. This meant that there was no remaining claim to be heard by the tribunal, and the listed final hearing was therefore vacated.

23. The claimant requested written reasons within the specified 14 days.

Reasons for the tribunal's refusal of the amendment application

24. The tribunal noted the parties' submissions.

25. Some might argue that there is an air of unreality in applying to amend a claim when it has been conceded that the tribunal has no jurisdiction to hear the existing claim. However, a point has not been taken that there is no valid claim to amend. The tribunal has therefore proceeded on the basis that it should make a decision on the amendment, before formally ruling on the unfair dismissal claim, but in the clear understanding that if

the amendment is not allowed, there would be no remaining claim to go forward to a hearing.

26. In summary, the salient points advanced by the claimant were as follows: the claimant wished to add allegations of harassment related to sexual orientation (section 26 of the Equality Act 2010), by reference to his son's sexuality. The amended particulars of claim of 15 July 2-17 referred to "numerous occasions" of being subjected to name-calling and being given various indecent pornographic images, referring to sexual orientation, albeit without referring to specific occasions. It is said that no action was taken in response to the claimant's complaint about this, but it is not specified as to whether this inaction is intended to be an allegation of harassment. The failure to take action is, however, said to be some unspecified form of direct discrimination, but it is not at all clear how such a discrimination claim would be argued. The claimant also seeks to bring a claim of protected disclosure detriment and automatically unfair dismissal. He referred to a protected disclosure on 27 November 2018 (the date of dismissal) and on other unspecified occasions, relating to the endangering of health and safety. The detriment is said to be work being withheld from the claimant and allocated to others. He is said to have been dismissed because of these disclosures.

27. The application of 15 July 2019 argued that the application was because the claim form "does not sufficiently particularise his claims". He did not tick the relevant boxes but subsequently asked that they were ticked. The claims arose from the same pleaded facts. There were no time limit issues. It was in the interests of justice to allow the amendment. In oral submissions, Mr Robson referred to the contents of the ET1, the email of 11 June and the amendment application, and asserted that all these matters were in the mind of the claimant at the time of the claim, which referred to bullying and indecent pictures. He was not legally represented at the time. All the claims were apparent from the claim form or it was just and equitable to allow the amendment. It would be no more than relabelling.

28. The respondent's written submissions of 19 July 2019 robustly resisted the application, arguing that the claim was identified only as unfair dismissal, which the claimant now accepted should be struck out. The application was opportunistic after a strike out warning and talking legal advice, and presented entirely new claims, relying on new facts. The claimant should have presented a new claim. The application was unreasonable and an abuse of process, on after the claimant realised that his unfair dismissal claim needed to be struck out. It was prejudicial to the respondent to allow these new claims, which would require further case management. If the application was allowed, the respondent would need further particulars of claim, an opportunity to respond, and fresh case management. In oral submissions, Mr Bryan repeated that the claims now relied on were entirely new, and not a re-labelling exercise. There was no mention of discrimination or whistleblowing at all in the claim. The new

claims were well out of time. The time limit for claims arising from the dismissal was 22 March 2019. If the new claims "were in the mind of the claimant" then he should have put them in his claim form. No explanation for the delay in making the application had been given, other than "I ticked the wrong box". It was very prejudicial to the respondent, because it would now have to face new claims, relating to a period some time ago. It would need to deal with the new allegations, the existing listing would need to be vacated, and a longer hearing listed at some point in the future.

29. Mr Robson was permitted a brief reply, and argued that references to bullying and indecent pictures could be read as a claim for discrimination, by a claimant who had not been legally represented at the time, and it was open to the respondent to seek further particulars.

30. The tribunal, under its case management powers, has the discretion to decide whether to permit the proposed amendment. That discretion has been exercised in accordance with the overriding objective to deal with cases fairly and justly. The tribunal has considered the relevant case law, in particular Mummery J's guidance in the well-known case of *Selkent Bus Co Ltd v Moore [1996] IRLR 661,* to which the parties had been referred.

31. This is a case where the claimant's original claim form of 14 January 2019 had claimed only unfair dismissal, with no suggestion of any sort of automatically unfair dismissal, and providing only a very brief background (at paragraphs 8.2 and 9.2 of the form). Only the "unfair dismissal" box was ticked. The claimant, erroneously, asserted that he had more than two years' service, and the tribunal therefore was not on notice that in fact there was no jurisdiction to hear an unfair dismissal claim. The text contains no indication whatsoever that the matter was intended to be some form of discrimination, or might involve whistleblowing (ie: making a protected disclosure). If Mr Robson is right (without providing any evidence from his client) that the claimant had discrimination and whistleblowing in his mind when he completed the claim form, it is very surprising that this was not reflected in what he chose to put on the form. There is a reference in the text to "bullying" and to "indecent pictures with my name above it". There is nothing referring to any protected characteristic or to any form of discrimination. There is no mention of the claimant's son. There is no mention of any protected disclosure; the nearest thing is an explanation that when he discovered wheel nuts missing on his HGV he told his boss what had happened and did not like the advice he was given to remedy the issue. There is nothing indicating anything capable of being a qualifying disclosure.

32. Another piece of relevant background is that the respondent had complained in the ET3 that the claimant had brought another (unmeritorious) claim, for personal injury, against them in late 2018, and that he had conducted a campaign of making untrue allegations against individuals at the respondent. Mr Robson did not seek to assert that no such claim had been brought, or that there had not been various

allegations made against the respondent. Although this is not determinative either way, and without any information as to whether any such claim or allegations had merit, this would tend to indicate that the claimant had been ready to pursue various issues against the respondent prior to the ET3 (received 28 March 2019), but would make it all the more surprising that he had not set out in his ET claim form what matters he wished to pursue, if he was genuinely of the belief that what had happened to him was discriminatory and/or as a result of being a whistle-blower. Whilst perhaps nothing hangs on this, these are matters which would doubtless have been put to the claimant had he chosen to give evidence concerning his failure to set out in the ET1 claim form, the claims now relied upon.

33. Notwithstanding the fact that the claimant was not legally represented, he was able to fill in his claim form in plain language and clearly was in a position to decide what boxes he ticked, and what he chose to say. The claim form can be read only as a claim for unfair dismissal, by reference to section 98 of the Employment Rights Act 1996.

34. The tribunal would observe that the respondent correctly calculated that the time limit for presenting a claim based on the effective date of termination would be 22 March 2019, and proportionately earlier for a claim based on earlier events (or longer, if more than three months before ACAS early conciliation commenced).

35. As indicated above, the respondent resisted the claim on the basis that it was an unfair dismissal claim, and the respondent believed that the dismissal (for gross misconduct) was fair. This was served on the claimant on 4 April 2019. Had the claimant believed that he was pursuing a discrimination claim, as Mr Robson invited the tribunal to conclude, one might expect his to respond immediately, pointing out that the respondent did not deal with his claim. He did not do so.

36. What in fact happened was that the respondent only belated realised that the claimant had provided inaccurate information on his form, and that he did not in fact have the necessary qualifying service to bring an unfair dismissal claim, and informed the tribunal and the claimant on 31 May 2019 (received 3 June 2019) as soon as it was discovered that there was no jurisdiction for the tribunal to hear the claim. The email does not apply to amend the claim, save that it states, rather ambiguously “please be advised to amend the appropriate box”. It does not indicate which boxes should have been ticked. It refers to “victimisation, discrimination, name calling, indecent pictures” and to health and safety. It gives no indication as to any protected characteristic being relied upon, or what acts are said to have formed any sort of discrimination. It does not mention the claimant’s son. It makes no suggestion that the claimant had made a protected disclosure. There was still nothing capable of founding a claim for harassment related to sexual orientation, nothing capable of founding a

claim for direct discrimination, and nothing capable of founding acclaim for protected disclosure detriment or automatically unfair dismissal.

37. It would appear that the tribunal is being asked to conclude that by 11 June 2019, the discrimination and whistleblowing, now relied upon, had been sufficiently pleaded. The tribunal disagrees.

38. A strike out warning was then given to the claimant. Only then, it would appear, did he take the matter seriously, and approached solicitors. When an application to amend was belatedly made by Warner Goodman on 15 July 2019, arguing that the claimant should be permitted to bring the new claims now relied upon, it took matters very considerably further. Although its sets out the heads of claim, it does not, however, provide enough clarity and proper pleadings would still be needed. Mr Robson has not really able to explain the claim much further at the preliminary hearing.

39. The tribunal considers that the original claim was plainly, and unequivocally, only one for unfair dismissal. There is nothing which can be read as discrimination or protected disclosure. There is no reference t6o the claimant's son. There is no reference to many of the facts the claimant now seeks to rely upon. The claimant only suggested he might want to change the basis of his claim after he was told that the original claim could not succeed. Even then, there was no proper application to amend, and the claimant did not indicate what his new claims actually were. By then all claims were already well out of time. No explanation was given then, and there is still no satisfactory explanation, as to why the claims were not set out in the claim form, even in non-legal language.

40. The actual amendment application was almost 4 months out of time, and only after the claimant was warned that it was intended to strike out his claim. The date of the preliminary hearing was 5 months out of time for any claim arising out of the dismissal (and some allegations, although regrettably not dated, plainly pre-date the dismissal by some time).

41. Using the structure suggested in ***Selkent Bus***, the tribunal should exercise discretion taking into account all the circumstances and balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

42. An initial point to consider is the nature of the amendment. The tribunal considers that this is plainly not a minor matter such as the correction of clerical or typing errors. It obviously goes very considerably further than that. It is not merely a relabelling exercise. Whilst some of the pleaded facts are relied upon, it is a wholly new claim relying not only on entirely new allegations, but relying on key facts which had not been referred to in the claim form. Indeed, it appears to have been motivated by the dawning realisation (once it was raised by the respondent) that in fact the tribunal did not have jurisdiction to hear an unfair dismissal claim, and the claimant looked around for something else he might be able to hang a claim on,

even though it was another month before he identified what such a claim might be and made an application to amend.

43. What the claimant now seeks to rely upon is wholly different from what he had set out in his claim form, and indeed what he referred to in his email of 11 June 2019. It is legally completely different. It relies upon new facts, and requires a wholly different response from the respondent, should it be required to resist the claim, which would also need considerable further case management, a need to vacate the hearing and the hearing replaced by a rather longer one at some date in the future, probably in the second half of 2020. The nature of the amendment amounts to a very significant change, and the pleading of a new claim.

44. Linked to the above, it may be helpful to set out the applicability of the statutory time limits, and the timing and manner of the application, together. The time limits, and the delay, have been referred to above. The tribunal notes that not only is no adequate explanation given for not pleading the whistleblowing and discrimination claims in the original claim form, Mr Robson even asked the tribunal to conclude that the current claims were "in the claimant's mind" when he presented his unfair dismissal claim. Plainly all the facts now relied upon were indeed in the knowledge of the claimant when he presented his claim, and indeed his solicitors now seek to rely upon matters raised by the claimant on 27 November 2018: it is surprising that he did not reflect on this and put matters in his claim form, presented some weeks later. That makes it all the more unreasonable that he did not say what was in his mind at the time, why he did not raise the point as soon as he had read the response, and why (on being notified that his claim was unarguable) immediately responded by indicating the he wanted to bring a different claim, but without setting out with any clarity what that new claim might be. The claimant eventually consulted solicitors after the strike-out warning, but no explanation has been put forward as to why he did not do so earlier. Even his instructions to solicitors has resulted in an amendment application which is still short on some of the necessary detail, and as indicated would result in the postponement of the hearing by many months. The timing and manner of this very late application does not assist the claimant's case as to amendment. Mr Robson did not set out any coherent argument as to why it would have been just and equitable to extend time for so long. The relevant date is the date of the preliminary hearing (albeit the date that the application was made is a relevant factor), but there is nothing before the tribunal suggesting that the claimant was unaware of time limits, that there was anything preventing him bringing his claim/amendment application earlier. Taking account the balance of prejudice referred to below, and taking account case law such as *Robertson v Bexley Community Centre*, this is not a case where it is likely to be just and equitable to extend time by as long as five months.

45. In weighing up the balance of injustice and hardship, the claimant has had ample opportunity to address the tribunal, as well as being encouraged to

deal with the application at the preliminary hearing within the terms of *Selkent Bus*. Mr Robson has not highlighted any injustice or hardship to the claimant, were he to be prevented from bringing the claim he now seeks to bring. The application for amendment merely asserts baldly that "the claimant would "be severely prejudiced in not having his claims heard". That is not further explained, and of course at present there is no such claim before the tribunal. Mr Robson had the opportunity of elaborating at the preliminary hearing, but did not do so. The tribunal would accept, as a matter of common sense, that the effect of refusing the amendment would be to stop the claimant from bringing any claim at all, because the existing claim would inevitably have to be dismissed for want of jurisdiction, albeit it was Parliament's choice that employees with less than two years' service should not be permitted to have such a claim heard. The tribunal also considers that the new claims are ones which the claimant could very easily have brought at the time, rather than much later. It was open to the claimant to provide evidence, and detailed submissions, relating to injustice and hardship, and the reasons for delay. He did not.

46. Mr Bryan, for the respondent, has, however, expressly argued that the respondent would be disadvantaged by the delay, dealing with facts that are an increasingly long time in the past, that this would result in a substantially delayed final hearing, and the extra work which would now be required in responding to a whole new set of allegations. The respondent had responded to an unfair dismissal claim (already expending extra work in defending it on the facts, relying on the incorrect dates which the claimant had supplied in the claim form, when in fact the tribunal never had the jurisdiction to hear the claim at all). They have already needed to respond to an amendment application and to attend an extra preliminary hearing, and if the amendment was allowed would firstly need further and better particulars of claim, and would then need to present an amended response, probably before a further preliminary hearing some time in the future, which would set a final hearing date well into the future, by which time memories can be expected to have faded. The tribunal agrees with Mr Bryan that this amounts to injustice and hardship, and if a refusal of the amendment has the effect of preventing the claimant from pursuing any claim, he is the author of his own misfortune.

47. Looking at all the circumstances in the round, the tribunal agrees with the respondent that if the amendment was permitted, this would amount to a significant new claim. This would cause injustice and hardship to the respondent, when the claimant has not set out any convincing case why the interests of justice point towards an amendment, allowing the claimant, at this late stage, to bring the claim that he is said to have intended to bring as long ago as January 2019, but which he did not bring. Applying the *Selkent Bus* factors, the tribunal does not consider that it would be in the interests of justice to allow the amendment.

48. The tribunal therefore refuses the claimant's application to amend.

49. The only claim currently before the tribunal is one of unfair dismissal under sections 93 and 98 of the Employment Rights Act 1996. The claimant concedes that the tribunal has no jurisdiction to hear such a claim, pursuant to section 108. The tribunal therefore dismisses the claim for want of jurisdiction.

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Employment Judge Emerton
Date 18 December 2019