



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106027/2019

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Held in Edinburgh on 18 & 19 November 2019

Employment Judge M Sangster

10 **Mr S Lamond**

**Claimant
In Person**

Scottish Ministers

**Respondent
Represented by:
Mr D Long
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's application to amend his claim,
20 to include claims for unauthorised deductions from wages and a claim that he was
automatically unfairly dismissed for a reason falling within section 100(1) (a) or (c)
of the Employment Rights Act 1996, is granted. The remainder of the claimant's
application to amend his claim is refused.

REASONS

25 **Background**

1. On 22 February 2019, the claimant was informed that his employment would terminate on 24 May 2019.
2. He engaged in early conciliation from 17-24 April 2019 and lodged his claim with the Tribunal on 1 May 2019 (the **Original Claim**). At section 8.2 of his ET1
30 form, the claimant referred to an attached paper, which extended to 12 pages, setting out the details of his claim. That attached paper, in turn, referred to and attached a further 75 pages of documents.

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3. A case management preliminary hearing took place on 23 July 2019. In advance of the case management preliminary hearing the claimant completed an agenda which referred to an attached paper extending to 33 pages (the **Agenda**). This was received by the Tribunal on 2 July 2019.
- 5 4. Following discussion at the case management preliminary hearing a note was issued which stated *'it was clear from the Claim Form and the agenda that the claimant pursued claims of unfair dismissal under section 98 of the Employment Rights Act 1996 (ERA) and for a number of claims of disability discrimination under the Equality Act 2010 (EqA).'* The note recorded the
- 10 following matters as arising during the preliminary hearing:
- (i) It was noted that the claimant may be seeking to advance claims under the following sections of the EqA: 13 (direct discrimination); 15 (discrimination arising from disability); 19 (indirect discrimination); 20 (failure to make reasonable adjustments); and 26 (harassment). He was not however able to provide the required details of these claims. The claimant was informed of the matters which would require to be specified to pursue these claims under EqA and ordered to provide further and better particulars on that basis.
 - 15 (ii) The claimant sought to add a claim for holiday pay. This was considered as an application to amend the claim. That application was granted, subject to clarification of the nature of this claim and whether there was an issue of time bar.
 - 20 (iii) It was noted that the claimant made reference to a claim under section 100 ERA. He was directed to confirm, within 14 days, whether he wished to pursue such a claim and informed this would require to be considered by way of an application to amend the claim.
 - 25 (iv) A further case management preliminary hearing was fixed for 25 September 2019 and a final hearing fixed for 5 days commencing on 18 November 2019.

5. Following the case management preliminary hearing, the claimant provided a further document, entitled '*Responses in relation to note following preliminary hearing on 23 July 2019*', extending to 13 pages (the **Further Particulars**). This was received by the Tribunal on 6 August 2019.
- 5 6. The respondent responded to this document by email dated 20 August 2019. They attached a table to their email and invited the claimant to complete this prior to the next case management preliminary hearing. The claimant did so, detailing 14 acts of discrimination, the majority of which occurred in 2017 (the **Scott Schedule**). This was received by the respondent on 29 August 2019.
- 10 7. The case then called for a further case management preliminary hearing on 25 September 2019. At that hearing the respondent stated that they had commenced preparations for the final hearing on the understanding that the claimant was only bringing two claims: that he was unfairly dismissed and that his dismissal amounted to unlawful discrimination on the grounds of disability.
- 15 The respondent raised concerns that, in producing clarification of his claims, the claimant had sought to bring 14 additional claims before the Tribunal. To the extent that this constituted an application to amend the claim, that was opposed. The claimant stated that the 14 claims detailed in the Scott Schedule were already included in his ET1. It was determined that the final hearing set
- 20 down for 5 days commencing on 18 November 2019 should be discharged and a 2 day open preliminary hearing be fixed, to commence on that date. The principal issues to be determined at the preliminary hearing were:
- (i) Whether the claimant, in the Further Particulars and the Scott Schedule, has sought to add new heads of claim to the Original Claim?
 - (ii) If so, under what heads of claim (and statutory provisions) has he sought to add claims?
 - (iii) Are any or all of the new claims which the claimant seeks to add time-barred?
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(iv) If there are new claims, should the Tribunal grant the application to amend the Original Claim to include these?

(v) Is the holiday pay claim permitted to proceed?

5 8. The case accordingly called for an open preliminary hearing, commencing on 18 November 2019, to determine these issues.

9. The claimant gave evidence on his own account at the preliminary hearing. The respondent did not lead any evidence.

Findings in fact

10 10. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proved.

11. The claimant is 64 years old. He had 27 years' service with the respondent at the point his employment terminated.

15 12. The claimant was absent from work from 12 March 2018 until the termination of his employment on 24 May 2019, principally due to suspension from work, albeit that there were some periods during his suspension when he was also certified as unfit to work due to ill health, most notably from 19 March - 30 June 2018 and also in December 2018. His GP indicated that he was fit to return to work on a phased basis in January 2019.

20 13. The claimant sought some guidance from Acas in August 2018, on becoming aware of the obligation on employers to make reasonable adjustments.

14. On 22 February 2019, the claimant was informed that his employment would terminate on 24 May 2019.

25 15. On being informed that his appeal had been unsuccessful, by letter dated 15 April 2019, he spoke to Acas again and instituted early conciliation. He also sought advice from the Citizens' Advice Bureau (**CAB**), prior to lodging his ET1 Form.

16. The claimant sought advice from his trade union representative in relation to his potential claims, but decided to conduct the Tribunal process himself (his

trade union representative was present at the first case management preliminary hearing, but did not represent him at that hearing).

17. The claimant has, throughout the process, researched matters himself and has been supported in the process by his brother and daughter.
- 5 18. Since his dismissal the claimant has been seeing a psychologist. He takes medication for his condition.

Claimant's submissions

19. The claimant submitted that he understood the further details provided, in the Agenda and Further Particulars, would be accepted as further information in relation to his claims.
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20. He indicated that he understood the three month time limit began from the termination date. He was aware from a CAB print out that conduct could extend over a period of time and, where this is the case, time runs from the end of that period.
- 15 21. He noted that the EHRC Code indicated that if claims were brought outwith the requisite period then they could still be accepted by a Tribunal, if they felt it was just and equitable to do so, taking into account the prejudice to each party.

Respondent's submissions

- 20 22. The respondent stated that only two claims were raised in the ET1: unfair dismissal and that the claimant's dismissal amounted to discrimination on the grounds of disability.
23. The documents attached to the ET1 do not give notice of any additional claims. The claims found in the Agenda, Further Particulars and Scott Schedule should be treated as additional claims which can only be added by way of amendment.
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24. The claimant should not be permitted to amend his claims to include additional claims. The case of **Selkent Bus Company Limited v Moore** 1996

ICR 836 provides the proper test to be applied when deciding whether to allow an application to amend. In this case it was held that an application to amend can be refused where *'the amendment pleaded facts which had not previously been pleaded in support of a new case.'* An explanation will normally be required where new facts are alleged which were in the knowledge of the claimant at the time when he was dismissed. Such an explanation is lacking in this case.

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25. The proposed new claims range in date from 2012 to 15 January 2019. Given the terms of section 123(3)(b) EqA, omissions occur when the employer decided not to take the action, or where there is an inconsistent act. The claims the claimant seeks to add are time barred. It is not just and equitable to extend time having regard to ***Robertson v Bexley Community Centre*** (2003) EWCA Civ 536 and ***British Coal Corporation v Keeble*** (1997) IRLR 336.

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Relevant law

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26. Employment Tribunals have a broad discretion to allow amendments at any stage of proceedings, either on the Tribunal's own initiative or on the application by a party. Such a discretion must be exercised in accordance with the overriding objective (which is set out in the Employment Tribunals Rules of Procedure) of dealing with cases fairly and justly. Although various principles apply specifically to the assessment of an application to amend, the need to comply with the overriding objective underlies the application of those principles.

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27. In ***Selkent Bus Company Limited v Moore*** 1996 ICR 836 guidance was given as to how Tribunals should approach applications to amend. The EAT confirmed that any application to amend a claim must be considered in light of the actual proposed amendment, so that the Tribunal may understand and give consideration to the purpose and effect of the amendment. It is important therefore that the application sets out the terms of the proposed amendment in the same degree of detail as would be expected had it formed part of the

original claim, that is to say, such as to give fair notice to the other party of the case which it is to meet.

28. In approaching the question of whether to allow an application to amend, Tribunals must have regard to all the relevant circumstances and in particular to any injustice or hardship which would result from the amendment or a refusal to allow it (**Cocking v Sandhurst (Stationers) Limited and another** 1974 ICR 650, NIRC).

29. Accordingly, when determining whether to grant an application to amend Tribunals should carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the levels of hardship that would be caused to the parties by granting or refusing the amendment. In **Selkent** the then President of the EAT, Mummery P, explained that relevant factors would include:-

(i) **Nature of the amendment** - i.e. is the amendment, for example, one involving the correction of clerical or typographical errors, the addition of factual details to existing allegations and or the addition or substitution of other labels for facts already pled? Alternatively, is the amendment one which involves the making of entirely new factual allegations that change the basis of the existing claim? In other words, whether the amendment sought is a minor matter, or a substantial alteration pleading a new cause of action.

(ii) **Applicability of time limits** – if a new claim or cause of action is proposed to be added by way of amendment, the Tribunal should consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended.

(iii) **Timing and manner of the application** – an application should not be refused simply because there has been delay in making it, as amendments may be made at any stage of the proceedings. 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 identification of new facts or new information from documents disclosed on discovery.

30. The above is not an exhaustive list. There may be additional factors to consider in any particular case, but the above basic factors should form part of the Tribunal's consideration.
31. The hardship and injustice test is a balancing exercise. As noted by Lady Smith in *Trimble and another v North Lanarkshire Council and another* EATS0048/12 it is inevitable that each party will point to there being a downside for them if the proposed amendment is allowed or not allowed. It will therefore rarely be enough to look at the downsides or 'prejudices' themselves. These need to be put in context, and that is why it is important to look at all the surrounding circumstances.

Discussion & Decision

Claims detailed in the Original Claim

32. The Tribunal firstly considered the terms of Original Claim, to ascertain what claims were raised within that. The Tribunal considered, taking into account the terms of the ET1 and the fact that the claimant is not legally qualified, that the following claims are detailed in the claim originally submitted to the Tribunal:
- (i) A claim of ordinary unfair dismissal;
 - (ii) A claim that his dismissal was direct discrimination on the grounds of disability;
 - (iii) A claim that his dismissal amounted to discrimination arising from disability; and
 - (iv) A claim that the respondent failed to make reasonable adjustments by allowing him to work on a part time basis in July 2018 and December 2019 (page 5 & 6 of paper apart to ET1).
33. Those claims will proceed to a final hearing.

Holiday Pay Claim

34. The claimant’s application to amend his claim to include a claim in relation to unpaid holiday pay was considered at the case management preliminary hearing on 23 July 2019. It was granted, subject to any issue of timebar being identified.
35. In the Further Particulars, the claimant confirmed that his claim was one of unauthorised deductions from wages, contrary to s13 ERA. His position is that, on the termination of his employment, he was only paid 10 days’ holiday pay in respect of the holiday year 2018-19, rather than the 21 days’ holiday pay which he was entitled to. The respondent confirmed, in response, that they do not consider that there is any timebar issue.
36. On the basis that the application to amend was granted, subject to this point, this claim will proceed to a final hearing.

Additional Claims

37. The Tribunal then considered what additional claims the claimant has sought to bring in the Further Particulars and in the Scott Schedule.
38. The additional claims of discrimination which the claimant seeks to bring are summarised in the Scott Schedule and are, in turn, further summarised below (following the numbering in the Scott Schedule and with items 7 & 11 being deliberately omitted), with the date the claimant alleges they occurred.

	Type of Claim	Basis for claim	Date
1	Direct discrimination	Failure to follow correct process in setting objectives	May-Dec 17
2	Direct discrimination	Failure to follow the Managing Attendance and Absence Policy	Feb 17

3	Discrimination arising from disability	Failing to provide the claimant with a private office	Nov 17
4	Indirect discrimination	Failure to undertake stress risk assessments	June 17
5	Indirect discrimination	Making a recommendation to dismiss the claimant prior to the capability hearing	Jan 19
6	Indirect discrimination	Failure to follow the Managing Attendance and Absence Policy	June-Dec 17
8	Harassment	Comment from line manager	Oct 16
9	Harassment	Being target of malicious allegations from staff	Jan 17
10	Harassment	Line manager auditing the auditor's report	March 17
12	Harassment	Staff looking though desk	Feb-June 17
13	Harassment	Staff making derogatory comments	July 17
14	Harassment	Line manager micro-managing work	July 17 to March 18*

** While the claimant stated this continued until December 2018, this could only be up to March 2018, which was when he last attended work with the respondent.*

39. The claimant confirmed at the preliminary hearing that, to the extent that these claims were not included in the Original Claim, he sought to amend his claim to include them.

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40. In addition, the claimant confirmed, in his Agenda, that he wished to pursue a claim under section 100(1)(a) & (c) ERA. In the Further Particulars he confirmed that he wished to amend his claim to include a claim on this basis.

Application to Amend

41. The Tribunal considered it appropriate to consider timebar to the extent that it arose in consideration of the amendment application, rather than as a separate consideration.

5 42. In considering the application to amend, the Tribunal considered each of the factors set out in *Selkent* and reached the following conclusions.

Nature of the amendment

43. The claims which the claimant seeks to introduce by way of amendment are:

10 (i) Those summarised in the table at paragraph 38 of this judgment (the **Additional Discrimination Claims**). These are entirely new claims of discrimination on the grounds of disability, which were not included in the Original Claim; and

15 (ii) A claim that the reason for his dismissal fell within s100(1)(a) or (c) (the **s100 Claim**). Again, this is a new claim which was not included in the Original Claim.

The amendment accordingly seeks to substantially change the basis of the Original Claim, making new factual allegations and pleading entirely new causes of action. It is noted however that there is an overlap between the existing unfair dismissal claim and the s100 Claim.

20 *Applicability of time limits*

25 44. With one exception, namely number 5 in the table at paragraph 38 above, each of the Additional Discrimination Claims are brought substantially outwith the normal time limits for raising those claims. The amendment seeks to introduce new causes of action in relation to events which occurred, at the latest, in March 2018. This was well over a year before the Original Claim was submitted and in some cases over two years before the claimant first alluded to claims of disability discrimination, on this basis, in these proceedings.

45. The Additional Discrimination Claim referred to at number 5 in the table at paragraph 38 above occurred on 15 January 2019. This was first mentioned in the context of a disability discrimination claim in the Further Particulars, which were submitted on 6 August 2019.

5 46. Claims of discrimination on the grounds of disability should be brought within 3 months of the date of the act to which the complaint relates. Tribunals have discretion to extend that time limit by such period as they consider just and equitable, taking into account a number of factors which are detailed and considered below.

10 (i) The length of and reasons for the delay. This is addressed at paragraphs 44-45 and 49 of this judgment.

(ii) The extent to which the cogency of evidence is likely to be affected by the delay. A final hearing will not now take place until 2020. The cogency of the evidence in relation to the Additional Discrimination
15 Claims, the majority of which occurred in 2017 would undoubtedly be impacted by the delay.

(iii) The promptness with which the claimant acted, and the steps taken by the claimant to obtain appropriate professional advice, once he knew of the possibility of taking action. It is clear that the claimant
20 was a member of a trade union and was aware of the ability to seek advice from the CAB. He sought advice from both prior to submitting his ET1. There was however no explanation as to why he did not do so sooner.

47. The s100 Claim was first mentioned in the Agenda, which was submitted on
25 2 July 2019. The claimant confirmed in the Further Particulars, which were submitted on 6 August 2019, that he did indeed wish to amend his claim to include such a claim. The claimant's employment terminated on 24 May 2019. This claim was accordingly intimated within the requisite time limits, albeit it was not included in the original claim.

Timing and manner of the application

48. The Tribunal considered why the application was being made at this stage.

49. The Tribunal did not receive any satisfactory explanation as to why the Additional Discrimination Claims, the majority of which occurred in 2017, were not raised at that time or, at very least, within the Original Claim, submitted on 1 May 2019. The claimant variously referred to this as being due to his health (but it is noted that he was not certified as unfit to work throughout that period), incorrect advice being received (although there was no evidence given that he received incorrect advice on time limits) and that the completion of the proforma agenda document, in advance of the case management preliminary hearing, prompted him to consider what further claims he may be able to bring.

50. The claimant confirmed that the s100 Claim was included in the Agenda as a result of the proforma agenda document, completed in advance of the case management preliminary hearing, prompting him to research what further claims he may be able to bring.

51. The Tribunal also noted that, despite the Orders of the Tribunal, following the preliminary hearing which took place on 25 July 2019, in many cases in relation to the Additional Discrimination Claims, the claimant has not provided the specification which would be required to pursue his claims – for example in relation to Additional Discrimination Claim referred to at number 5 in the table at paragraph 38, the claimant has not specified any group disadvantage and, in relation to most of the Additional Discrimination Claims of harassment, he has not specified why he claims the conduct was related to his disability. As a result the claims are not set out in the degree of detail which would be required to give the respondent fair notice of the case it may be required to meet.

Conclusions re Application to Amend

52. Taking into account the above factors, and considering the balance of hardship and injustice between the parties, the Tribunal concluded that

5 (i) the application to amend the claim to include the Additional Discrimination Claims is refused. The Additional Discrimination Claims are entirely new claims which are considerably out of time. No satisfactory explanation was advanced for why they were not brought sooner. The respondent would be prejudiced if the claims were allowed to proceed at this stage, as the cogency of evidence in relation to these claims would be significantly and adversely affected by the delay.

10 (ii) The application to amend the claim to include the s100 Claim is granted. The application to amend was made within the normal time limit for a claim and there is an overlap with the facts of the existing unfair dismissal claim. The balance of prejudice accordingly falls in the claimant's favour in relation to that claim.

15 **Date of Judgement: 13th December 2019**
Employment Judgement: M Sangster
Date Entered in Register: 13th December 2019
And Copied to Parties

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