



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 4112665/2018 Held in Glasgow on 25 January 2019

Employment Judge Shona MacLean

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Mr M McKelvie

Claimant
Represented by:
Ms K MacColl
Advocate

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Mitie Technical Facilities Management Limited

First Respondent
Represented by:
Ms L Shaw
Solicitor

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ARH Group Limited

Second Respondent
Represented by:
Mr P Smith
Barrister

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that (1) the claimant's application to amend should be allowed under deletion of paragraphs 17 and 19 of the "Claimant's Particulars of Complaint"; and (2) the second respondent's application for a deposit order is refused.

REASONS

Introduction

1. At the preliminary hearing for case management on 10 October 2018 (the October PH) the claimant's representative advised that an application to amend the claim form had been sent to the first respondent and the Tribunal on 9 October 2018 (the amendment application). The first respondent had not had an opportunity to consider the amendment application and was given an opportunity to do so.
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2. In the meantime, the second respondent was added to the proceedings on my Order dated 10 October 2018 following a joint application by the claimant and first respondent at the October PH. The second respondent presented a response on 31 October 2018.
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3. The first respondent informed the Tribunal and the claimant's representative on 6 November 2018 that the amendment application was opposed and set out the grounds for so doing (the November email). This preliminary hearing was arranged to consider the amendment application (the January PH).
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4. On 21 December 2018 the second respondent applied for the claim to be transferred to the Leeds Employment Tribunal where three claims which concern the same respondents and arising from the same facts were currently being considered (the Leeds claims). The Leeds claims were listed for a preliminary hearing for case management on 9 January 2019 to identify the issues and possibly consider striking out the claimants' claims under regulation 15 of TUPE and/or making deposit orders. The claimant had no objection to the second respondent's application. However, on 10 January 2019 the first respondent's representative advised the parties and the Tribunal that the Leeds claims were withdrawn following settlement. Accordingly, the January PH was to proceed as scheduled.
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5. On 18 January 2019 the second respondent made an application for the claimant to pay a deposit of no more than £1,000 as a condition of pursuing all or any of the assertions in his claim form (the deposit order application).
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The deposit order application was copied to the claimant's representative. The claimant's representative opposed it. The parties were advised that the deposit order application would be considered at the January PH.

Amendment Application

- 5 6. Ms Shaw, the first respondent's representative said that notwithstanding what was stated in the November email the first respondent's objection was now restricted to the proposed amended paragraphs 17 and 19 of the "Claimant's Particulars of Complaint".
7. Mr Smith, the second respondent's representative said that although the
10 second respondent had not formally objected to the amendment application he would be adopting the first respondent's submissions.
8. In the circumstances it was agreed that I would hear the objections to the amendment application and then Ms MacColl, the claimant's representative would respond.
- 15 9. Ms Shaw said that in the original claim form the claimant indicated that in addition to claiming a redundancy payment, holiday pay and notice pay he was making a claim "TUPE contract was not fulfilled". In its response the first respondent asked for additional information on the basis upon which the claimant claimed that the TUPE regulations have been breached. The first
20 respondent understood the claim to be about the claimant's employment being terminated because of a transfer.
10. Ms Shaw said that the amendment application seeks to add a new complaint under regulation 15 of TUPE. This new claim is out of time and lacks specification. There is no reference to any allegation of failure to
25 inform/consult/elect employee representatives in the original claim form. Also, the new claim is out of time as the alleged transfer took place on 1 June 2018. The latest time for the claimant to raise these claims would have been 1 September 2018 (subject to early conciliation). There has been no explanation provided as to why it was not reasonably practicable for him to
30 present this claim in time. In any event the basis on which the claimant is

raising the complaint under regulation 15 of TUPE is unclear. If the application is successful and the regulation 15 claim is permitted the alleged transferor, NG Bailey Limited would need to be added as an additional respondent to the claim.

- 5 11. Mr Smith adopted the first respondent's submission. He also drew my attention to paragraphs 5 to 14 of the "Claimant's Particulars of Complaint". He said that the claimant's position was that he had a "TUPE representative (Mr Symon)". There is reference to Mr Symon meeting the first respondent and Ms Crowther, HR Adviser Partner of NG Bailey Limited was involved in
- 10 meeting and discussions with the claimant about the transfer. It is therefore unclear from the proposed amendment application what was the alleged failure was on the part of the respondent's and it appears to fly in the face of the claimant's state of position. Also it was also not clear in what way the second respondent could have reasonably taken part in this stage as no
- 15 particulars are provided in support of this.
12. Ms MacColl invited me to consider the circumstances in which the amendment application was made. She noted that the first respondent's position had changed. She asked me to look at the matter by balancing the interests of justice and hardship.
- 20 13. Ms MacColl suggested I looked at the type of amendment and consider the fact that the claimant drafted the original claim form himself.
14. Ms MacColl said when the claimant's employment terminated he sought advice from a law clinic. He then presented the claim on 22 July 2018. Since then he was looking for new work. In addition, he had a family bereavement
- 25 and suffered ill-health requiring an operation on 23 August 2018. On 16 August 2018 the claimant discovered that he could obtain legal advice through his legal defence insurance. The first respondent presented a response on 26 August 2018 calling for details of the basis of his claim. It was in this context that the amendment application was prepared particularly taking account of
- 30 the fact that the first respondent's position is broadly that the second respondent was responsible. The original claim form referred to "Mitie had

failed to turn up for any meetings regarding the contract or TUPE". Ms MacColl suggested that the claimant had alluded to the first respondent having failed to inform and consult. The first respondent asked for additional information.

5 15. Ms MacColl said that the claimant had initially been unrepresented. He had sought advice and ultimately obtained legal advice. The amendment application arises out of the same circumstances.

16. Having heard the parties I noted that there was no issue that under rule 29 of the Tribunals Rules I had broad discretion to allow amendment at any stage
10 of the proceedings. However, such discretion must be exercised in accordance with the overriding objective of dealing with cases justly and fairly under rule 2 of the Tribunal's Rules.

17. This is the second preliminary hearing that has been arranged in this case. A final hearing has not yet been arranged. Although the second respondent has
15 presented a response the other parties have not replied to that and will require to so do.

18. I considered that in exercising any discretion I had to have regard to all the circumstances of the case, any injustice or hardship which would result from allowing the amendment or refusal to make it. This involved a careful
20 balancing exercise of all the relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by granting or refusing the amendment application. The relevant factors include the nature of the amendment, the applicability of time limits and the timing and manner of the application.

25 19. I first considered the nature of the amendment. From my reading of the original claim form the amendment application comprised:

- a. Expanding on the facts contained in the claim form.
- b. New facts most of which were known when the claim form was presented.
- 30 c. Raising a new cause of action – the claim under regulation 15 of TUPE.

20. While I accepted that the amendment included facts and allegations not previously pled I was not convinced that it would require the Tribunal and the parties to make new and different lines of enquiry that would necessarily expand on the documentary and oral evidence. It would possibly involve adding another respondent to the proceedings which would result in delay and expense.
21. Turning to the timing and manner of the amendment application, the claimant had the benefit of some legal advice from a law clinic before raising the proceedings. He completed the claim form himself on 22 July 2018. He became aware around 16 August 2018 that he could have the benefit of legal advice through his insurers. I considered that the amendment application was prompted by the first respondent's request around 26 August 2018 for additional information. While I acknowledged that the claimant had surgery around this time it was not clear to me why the amendment application was not made until 9 October 2018 on the eve of the October PH.
22. I appreciated that the lateness of an application is a relevant factor but not an insuperable reason for refusing an application to amend. The situation was unusual in that while there was a delay in making the amendment application the second respondent had not at that stage been added to the proceedings and a final hearing had not been fixed.
23. I considered that there was an issue in relation to time bar in respect of the regulation 15 claim. I agreed that this claim lacked detail and appeared contradictory to the other additional information that had been provided. There was no suggestion that there was any ignorance of the facts themselves or delay was due to any response from the first respondent. The claimant knew the extent of information and consultation that he and his employee representative had before raising the proceedings. The claimant did have some legal advice before presenting the claim.
24. I then turned to consider the interests of justice and of hardship of granting and refusing the amendment application. If it is allowed in its entirety I anticipate that there will be an application by the first respondent and possibly

the second respondent to add NG Bailey Limited as an additional respondent. The claimant has indicated he does not seek to add NG Bailey Limited as a respondent. Indeed, until receiving the first respondent's response his intention was to proceed against only the first respondent. If the amendment is refused the claimant will not be able to advance his regulation 15 claim however he will still be in a position to advance the claim which is set out in his originating claim form. As I understand it if the amendment under deletion of the regulation 15 claim is allowed albeit parties propose to provide additional information in light of the second respondent's response this would not involve adding another respondent particularly given the claimant does not wish to do so and the case could be listed for a final hearing.

25. Looking at all the circumstances and balancing the hardship and injustice to both parties I concluded that the amendment should be allowed under deletion of paragraphs 17 and 19 of the "Claimant's Particulars of Complaint".

15 **Deposit Order Application**

26. Mr Smith advised that the second respondent's deposit application was under rule 39 of the Tribunal's Rules: that the claimant's claim against the second respondent has little prospect of success. Mr Smith also said that the second respondent was not seeking a significant deposit of £1,000 (as stated in the application) but one of say £50 to £100.

27. I was referred to paragraph 3 of the "Claimant's Particular of Complaint". The claimant says that the second respondent took over reactive jobs, emergency light repairs and generator work. The first respondent took over the planned maintenance and emergency lighting. Paragraph 4 sets out the claimant's workload and the percentage time spent by him of various activities before 31 May 2018 of which only 18 percent of reactive work went to the second respondent. Therefore, the claimant has not set out why the second respondent would be the transferee in light of the division of the work.

28. I asked Mr Smith what his position was in relation to the first respondent bearing in mind its response and that my Order dated 10 October 2018 to add the second respondent to the proceedings was made following a joint

application by the claimant and the first respondent at the October PH. Mr Smith said that the deposit order application should be against both parties and in the first respondent's case the amount should be £1,000 given its ability to pay.

5 29. Ms Shaw had only very recently been aware of the deposit order application. It was in her view premature. The first respondent did not accept the facts narrated by the claimant and had not had an opportunity to provide additional information in reply to the second respondent's response.

10 30. Ms MacColl said that the joint application was based on the factual dispute arising from the first respondent's response. While the second respondent has been more candid in its response without clearer evidence the deposit order application is too soon. She was able to confirm that the claimant would be able to pay a deposit of £50.

15 31. While I appreciated Mr Smith's submission, I considered that the claimant did not initially raise the proceedings against the second respondent and only sought to do so when the first respondent's response was received. The first respondent disputed the facts set out by the claimant and was unaware of the deposit order application which was only directed against the claimant. The
20 first respondent as I understood it did not agree with the facts set out in the second respondent's response. I was not satisfied that at this stage that I could conclude that the claim against the second respondent had little reasonable prospects. Accordingly, the deposit order application was refused.

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Employment Judge: Shona MacLean

Date of Judgement: 28 January 2019

Entered in Register,

30 Copied to Parties: 29 January 2019