EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113176/2018

5 **Held in Glasgow on 5 December 2019**

Employment Judge R King

10 **Mr D McDougall (deceased)** **c/o Mrs Marion McDougall**	**Claimant** **Represented by:** **Mr T Pacey -** **Counsel**
15 **XPO Logistics**	**Respondent** **Represented by:** **Mr C MacNaughton -** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that the claimant's application to amend dated 22 August 2018 and the further particulars of that amendment dated 30 October 2019 are allowed.

25 ## REASONS

Introduction

1. Following his dismissal on 6 April 2018 the claimant submitted a claim of unfair dismissal and for unpaid notice pay on 9 August 2018, an ACAS early conciliation certificate having been issued on 26 July 2018. Although he did 30 not tick the box at section 8.1 of the ET1 to indicate he was making a claim of age discrimination he did indicate at section 9.2 of the ET1 that he was claiming £15,000 damages for injury to feelings for age discrimination.

2. On 22 August 2018, the claimant's former advisers, Stirling District Citizens Advice Bureau Limited ('the CAB'), wrote to the tribunal in the following terms -

"CASE NUMBER: 4113176/2018

5 ***Request to add claim for disability discrimination and age discrimination to the above claim for unfair dismissal***

Although we are not representing the Claimant, we are advising and supporting him and we attach his consent to write to you on his behalf. To make a submission to add disability discrimination and age discrimination to
10 *his claim referred to above; to be heard at the same time. The time limit for the claimant to lodge a claim is 25th August 2018.*

On seeking a legal opinion, we are advised that the basis for his submission on disability discrimination is that there may be grounds to claim under ***section 15 of the Equality Act 2010.*** *The basis for the claim would be that*
15 *the claimant was treated unfavourably (i.e. he was dismissed) because he had a blackout arising in consequence of his medical condition which we believe will qualify as a disability. Therefore, the claim would be that the dismissal was itself an act of discrimination.*

In addition, there may be grounds to claim a failure to make reasonable
20 *adjustments under* ***section 20 of the Equality Act,*** *on the basis that it would have been a reasonable adjustment not to treat the conduct in question, on this particular occasion, as conduct justifying dismissal. A further claim could potentially be indirect discrimination under section 19 of the Equality Act, on the basis that the company has applied a provision, criterion or practice (i.e.*
25 *treating certain conduct as conduct justifying dismissal) which has indirectly impacted on the claimant as a disabled person.*

We are further advised that there may also be grounds to claim indirect age discrimination under ***section 19*** *on the basis that the provision, criterion or practice indirectly impacts people within the Claimant's age group"*

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3. The CAB did not initially comply with Rule 92 of The Employment Tribunals Rules of Procedure when it sent its letter of amendment dated 22 August 2018 to the tribunal. However, it subsequently sent a copy of the letter of amendment to the respondent's Head of Human Resources on 30 August 2018 in compliance with Rule 92.

4. On 17 September 2018 the claimant sadly passed away and the case was sisted for a period to allow his family to consider whether to proceed with it. The sist was subsequently recalled on 28 February 2018 and a Judicial Mediation was fixed for 22 July 2018, which did not go ahead.

5. On 25 September 2019 a telephone case management hearing took place at which Ms Peat of McGrade & Co Employment Lawyers appeared on behalf of the claimant's widow. During the case management hearing Ms Peat explained that she intended to produce further particulars of the discrimination claims set out in the CAB's letter of amendment dated 22 August 2018. On behalf of the respondent its solicitor Mr McNaughton confirmed that he opposed the amendment and would also oppose any attempt to add further particulars to it.

6. An open preliminary hearing to determine whether to allow the claimant's amendment application and any subsequent further particularisation thereof was therefore fixed for 5 December 2019.

7. On 30 October 2019, McGrade & Co sent further particulars of the 22 August 2018 amendment to the tribunal and the respondent. In those further particulars they also sought to add one additional claim, namely that the respondent had failed to make reasonable adjustments to its disciplinary procedure when it refused to consider the claimant's letter of appeal against dismissal because it had been submitted outwith its five-day period for appealing.

Claimant's submissions

8. On the claimant's behalf, Mr Pacey submitted that the question as to whether the amendment should be allowed was a straightforward one. The

amendment had been made within the statutory time limit for bringing such claims and there would be no prejudice to the respondent in allowing it.

9. In respect of the additional reasonable adjustments claim set out in the further particulars dated 30 October 2019 he accepted that it had been made out of time having regard to the statutory time limit. However, he submitted that the balance of prejudice favoured the claimant and that it would be just and equitable to allow it in circumstances where it was not a fresh head of claim altogether but was simply a fresh allegation in support of the reasonable adjustments claim that had been foreshadowed in the 22 August 2018 amendment.

10. Otherwise, the other details of the claims set out in the further and better particulars were foreshadowed in the amendment dated 22 August 2018 and should be received in the event that the amendment was allowed.

Respondent's submissions

11. On behalf of the respondent Mr MacNaughton submitted that it had not received notice of the 22 August 2018 letter until 14 June 2019. As a result of that delay, the respondent now had evidential difficulties in answering the claims set out in the amendment and would suffer prejudice if it was allowed.

12. Dealing first of all with the new reasonable adjustments claim in respect of the appeal procedure, as set out in the 30 October 2019 further particulars, Mr MacNaughton submitted that this had not been foreshadowed in the ET1, which contained no allegation whatsoever about the fairness of the appeal procedure. Furthermore, the respondent had not received a notice of appeal from the claimant after his dismissal and the claimant was no longer alive to give evidence and be cross-examined about it. In these circumstances there would be significant prejudice to the respondent in dealing with that particular allegation. Indeed, both parties would be prejudiced if this element of the amendment were to be allowed as it was too dangerous a ground to litigate without the claimant to speak to the facts and without the appeal letter in question.

13. With regard to the amendment generally, while the respondent was not arguing time bar, the statutory time limit was only one element to be considered in determining whether the amendment should be allowed. Even accepting that the 22 August 2018 amendment had been made in time, the passage of time until now was prejudicial and apart from there being no documents in relation to the appeal procedure, it was inevitable that the memories of witnesses in relation to the evidence would have been affected. For example, the passage of time made it more difficult for the respondent to answer the case as to why it had not obtained medical evidence at the time of the dismissal.

14. Mr MacNaughton also submitted that the tribunal should take into account the merits of the case when determining whether the application to amend should be allowed. This was a stark case. The claimant had driven in the most reckless and dangerous manner possible. The claimant's unfair dismissal case would not benefit by his advancing additional discrimination claims and it would be unsafe to proceed on the basis that they should be allowed.

Claimant's submission in answer

15. Replying to the respondent's submission, Mr Pacey submitted that the tribunal should accept that the claimant's former representatives had in fact sent a copy of the 22 August 2018 amendment to the respondent's head of HR on 30 August 2018, as evidenced by the copy letter in the bundle. The respondent had not produced anything to gainsay that.

16. The respondent's alleged failure to investigate the claimant's illness before dismissing him had been set out in detail in the ET3. Indeed that failure was the whole basis of the unfair dismissal and discrimination claims.

17. The tribunal could still conclude that it was just and equitable to extend time to allow the reasonable adjustments claim if it did not find a good reason for the delay. The prejudice to both parties needed to be weighed in the balance. In these circumstances, there would be no prejudice to the respondent in allowing the amendment and the further particulars in their entirety.

18. The claimant did not accept that the tribunal should give weight to the respondent's submission that the claimant's claim was lacking in merit. The reasonableness of the respondent's decision to dismiss the claimant in circumstances where it had allegedly failed to adequately consider his medical condition was still a triable issue and the claim should be allowed to proceed to a hearing.

Discussion and decision

19. In ***Cocking v Sandhurst (Stationers) Limited & another 1974 ICR 650**,* Sir John Donaldson, when delivering the judgment of the NIRC, laid down a general procedure for tribunals to follow when deciding whether to allow substantial amendments. These guidelines have been approved in several subsequent cases and were restated in ***Selkent Bus Company Limited v Moore 1996 ICR 836**.* In that case, the EAT emphasised that the tribunal, in determining whether to grant an application to amend, must carry out a careful balancing exercise of the relevant factors, having regard to the interests of justice and to the relative hardship that will be caused to parties by granting or refusing the amendment.

20. Valuable guidance was provided by Mummery LJ at pages 843 and 844 in ***Selkent**:-*

"4 Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

5 What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

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 substituting a further label or substituting of further labels for facts already pleaded to, on the other hand, making of entirely new factual allegations which change the basis of the existing claims. 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 could be extended under the applicable statutory provisions e.g. in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978.

c. The timing and manner of the application.

An application should not be refused wholly because there has been a delay in making it. There are no time limits laid down in the regulations of 1993 for the making of amendments. The amendments made 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 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 amendments. Questions of delay, as a result of adjournment and additional costs particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

Present case

Nature of the amendment

21. In the tribunal's view, the amendment, as augmented by the further particulars dated 30 October 2019 is a substantial one, which adds new causes of action but they plainly arise out of the same facts as the original claim.

The applicability of time limits

22. There was no dispute that the amendment dated 22 August 2018 was made within the statutory time limit or that the purpose of the 30 October 2019 further particulars was to furnish additional information about those claims that had already been made in time.

23. In the circumstances, the only element of the amendment that was made out of time was the new allegation that there had been a failure to make reasonable adjustments to the appeal process, as set out in the further information dated 30 October 2019.

24. While that was plainly out of time, the tribunal found that it nevertheless arose out of facts already pleaded and that it would not materially extend the issues and the evidence in the case. In the circumstances it should not be subject to scrutiny in relation to the time limit and therefore the normal rules related to amendments, as set out in ***Selkent***, should apply and it should be considered alongside all the other parts of the amendment.

25. Even if the Tribunal is mistaken in its finding that this particular new allegation did not arise from the facts already pleaded, it would still have found that in all the circumstances it was just and equitable to allow time to be extended in any event and that it should be allowed in circumstances where the injustice that would be caused to the claimant were it not to be allowed would outweigh any injustice or prejudice suffered by the respondent.

The timing and manner of the application

26. The original amendment was made within two weeks of the ET1, but the fact that the claimant passed away soon after meant that no progress could

reasonably be made at all with the claim until his family had an opportunity, at the appropriate time, to consider whether to pursue his claim.

27. In due course the claimant's widow took advice from specialist employment lawyers and on their advice she elected to pursue her late husband's claim, as she is entitled to do. The delay between the raising of the claim and original amendment and the subsequent lodging of the further particulars was understandable and reasonable in the circumstances. No hearing has yet been fixed and there is still time for the respondent to answer the amendment and make preparations for a final hearing.

Relative prejudice and hardship

28. The respondent had notice of the ET1 and of the original amendment dated 22 August 2018 no later than the end of August 2018. It accepted that the further particulars dated 30 October 2019, save in one respect, simply provided further information about claims already pled in time. It had therefore already had considerable time to prepare to answer the claim.

29. Other than a general assertion that the delay would be prejudicial to the respondent's ability to answer the claim Mr MacNaughton gave no indication that any specific witnesses would now be unavailable or evidence no longer obtainable. Furthermore, despite the respondent's assertion to the contrary, it could not be said that the claim and the relative amendment was lacking in merit and that the amendment should be refused on that basis.

30. On the other hand the claimant would be significantly prejudiced if his widow was left unable to pursue claims of discrimination, which were made within the statutory time limit but delayed by the claimant having passed away soon after.

31. The tribunal was satisfied that the balance of prejudice favoured the claimant in the particular circumstances of the case because the injustice and hardship to the claimant of refusing the amendment would be disproportionate to the injustice and hardship to the respondent of allowing the amendment.

32. The tribunal therefore allows the claimant's amendment dated 22 August 2018, as augmented by the further information provided dated 30 October 2019.

Further procedure

5 33. The amendment having been allowed, the respondent should be allowed a period of 28 days to provide written answers, if so advised. Thereafter, the claim should be listed for a case management preliminary hearing.

10 Employment Judge:	R King
Date of Judgement:	16 January 2019
Entered in Register,	
Copied to Parties:	20 January 2019

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