EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123886/2018

Held in Glasgow on 9 December 2019

Employment Judge S MacLean

Mr X	**Claimant** **Represented by:** **Dr Healey - Solicitor**
Capita Customer Management Ltd	**Respondent** **Represented by:** **Mr Bradley - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's application to amend dated 24 October 2019 is refused.

REASONS

Introduction

1. This preliminary hearing was arranged to determine an application made by the claimant on 24 October 2019 under rule 29, schedule 1, of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the rules) to amend his claim. The respondent opposes the application.

2. The claim form was presented on 30 December 2018. The claimant was represented by Catherine Pollock (also known as Catherine Coombes and Catherine Granger). A response was presented on 7 February 2019. The first preliminary hearing took place on 14 March 2019 at which Ms Coombes explained that she was acting for the claimant on an interim basis as he was intending on appointing a solicitor to act on his behalf shortly. The claimant

was directed to provide further and better particulars. It was intended that the final hearing would take place between 17 June to 13 September 2019 and a further preliminary hearing was fixed for 24 May 2019.

3. On 27 March 2019, Ms Coombes emailed the Tribunal to advise that the claimant had received no payment from the respondent, and this was causing him further stress. He wanted to be allowed to "add a constructive dismissal to his clam claim as he cannot exist without the SSP payments". The claimant feels that the respondent, by not paying him, have breached their contract causing further discrimination and that all he can do is claim constructive dismissal along with his other allegations from 27 March 2019. He also referred to "the whistleblowing discussions".

4. On 2 May 2019, Employment Judge McManus said that the email of 27 March 2019 was being treated as a request to amend the ET1 to include a claim for "constructive dismissal". However, the claimant was asked to state the precise terms of the amendment at box 8.2 of the ET1 in respect of this claim and the reason why the proposed amendment was sought now. The claimant was asked to provide the terms of the proposed amendment by 12 April 2019.

5. Following a request to add a claim of failure to pay holiday pay, Employment Judge Sutherland directed in a letter dated 1 May 2019 that her understanding was that the claimant resigned on 27 March 2019 and intended to claim constructive dismissal. Time was allowed for the claimant to intimate a proposed amendment which has now passed. In the circumstances, the claimant was to prepare and present a separate claim for constructive dismissal and holiday pay within the time limits. An application could then be made to combine the claim with the current claim if there were common or related issues.

6. On 26 April 2019, the respondent sent a response providing the grounds of resistance in respect of the new claim. Employment Judge Cowen instructed that the claimant's amendment had not been accepted nor had the respondent's amendment and that this would be raised at the next preliminary hearing which took place on 24 May 2019.

7. At the preliminary hearing on the claimant was again represented by Ms Coombes during which there was discussion about the constructive unfair dismissal claim and the direction issues by Employment Judge Sutherland. The Employment Judge Garvie reminded parties that in the event there was to be a new claim then there was a time limit which is three months less one day that is 26 June 2019 for any such claim that might include holiday pay.

8. The Employment Judge Garvie also referred to the fact that the claimant did not appear to have the requisite two years continuous service to bring a complaint of constructive unfair dismissal. She did however refer to the Shaw v CCL Ltd IRLR 284, a judgment of the Employment Appeal Tribunal, and the IDS handbook "discrimination at work" at chapter 26.8 (page 872) and 26.99 (pages 918 to 919). This was specifically drawn to the claimant's attention as Employment Judge Garvie understood that the claimant was seeking to obtain legal advice on 28 May 2019.

9. On 18 June 2019, the Ms Coombes provided answers to the respondent's request for further particulars in which it is stated that the claimant "now has a lawyer and the lawyer will reach out separately to define the particular PCP which applies to his case. Currently his lawyer has had to take immediate compassionate leave but will reach out to Irwin Mitchell next week."

10. At a further preliminary hearing on 19 August 2019, Employment Judge Robison noted that Ms Coombes said that no ET1 claim form or an application to amend the current claim form had been made in respect of a claim for constructive unfair dismissal. Ms Coombes mentioned that the claimant was meeting Mr Healey of Livingston Brown on 21 August 2019 and a further preliminary hearing was fixed for 14 October 2019.

11. On 19 September 2019, Mr Healey for the claimant intimated further and better particulars of the claim.

"Constructive Dismissal

29 The claimant having been discriminated and harassed, and having found himself no further forward with his grievance, recognised his

employment contract has been breached. He had lost all trust and confidence in the respondent. He terminated his contract and was constructively dismissed. Said dismissal was discriminatory contrary to sections 13 and 15 of the Equality Act 2010."

12. At a preliminary hearing on 14 October 2019, Employment Judge Eccles noted that the current claims were direct disability discrimination under section 13 and 15 of the Equality Act 2010 and harassment under section 26 of the Equality Act 2010. A hearing was listed for 20 to 23 January 2020.

13. Employment Judge Eccles further noted:

"8. In his further and better particulars, the claimant refers to constructive dismissal. It is not in dispute that the claimant resigned from his employment with the respondent on 27 March 2019. Around that time, he wrote to the Tribunal to indicate that he wished to pursue a claim of constructive dismissal. The claimant was informed that he could either seek leave to amend his existing claim to add a claim of constructive dismissal or present a separate claim of which, if accepted, would be combined with the existing claim.

9. The existing claim has not been amended to add a claim of constructive dismissal. No separate claim has been presented. If the claimant intends to lodge a separate claim, it may be out of time and potentially time barred. The basis on which the claimant intends to establish constructive dismissal is unclear. The claimant does not have qualifying service to claim unfair dismissal under section 94 of the act and to date has not identified an automatically unfair reason for dismissal."

14. On 24 October 2019, the claimant applied to amend his application to include a claim, that the discriminatory treatment which he suffered was in breach of contract.

The application to amend the claim form

15. On 24 October 2019, the claimant applied to amend his claim form to include a claim that "the discriminatory treatment which he suffered at the hands of the respondent was a breach of contract in that the respondent, without reasonable and proper cause, conducted themselves in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between the respondent and the claimant."

16. The claimant accepted that he did not have a freestanding claim of unfair dismissal as he did not have the requisite two years' service required to make such a claim. However, he now sought to argue that the discriminatory treatment from which he suffered led to a dismissal in law, the effect of which would be the respondent would be liable for any loss suffered as a result of the dismissal since their discriminatory treatment was the cause of it.

17. The claimant accepted that the amendment was significant. There was however no new cause of action being introduced but rather further and better particulars in relation to the effect of the discriminatory treatment on the claimant and the damages sought in relation to that treatment.

18. On 27 March 2019 the claimant's lay representative, Ms Coombes emailed the Tribunal and intimated an intention to pursue a constructive dismissal claim. Ms Coombes was advised on 2 April 2019 that the email was being treated as a request to amend the claim form to include a claim for "constructive dismissal" and she had until 12 April 2019 to state the precise terms of the amendment and why the amendment was being sought now.

19. The terms of the amendment were not provided. Ms Coombes was advised to prepare a separate claim form for constructive unfair dismissal and holiday pay within the time limit.

20. At a preliminary hearing on 24 May 2019 Ms Coombes was advised that considering the previous direction the claim form cannot be amended to incorporate a claim of constructive unfair dismissal. I was referred to the case of *Prakash v Wolverhampton City Council 2006* [UKEAT/014006/0109] as

authority that a claimant can amend his claim form to include a claim that did not exist at the time the initial claim form was lodged.

21. At a preliminary hearing on 19 August 2019 Ms Coombes said that the claimant was instructing a legal representative. While the application was being made later than would be preferred, that was partly due to Ms Coombes being unable to provide copies of all correspondence sent to the Tribunal.

22. Ultimately, I needed to engage in a balancing act to determine whether it is in the interests of justice to grant the amendment application. This involves looking at the prejudice that would be suffered by the claimant if the amendment is refused against the prejudice which would be suffered if the amendment is allowed.

23. The prejudice to the claimant is significant in that he would lose the right to argue the discriminatory treatment forced him to resign from employment. Against that, the respondent's potential prejudice which can only be a successful claim of discriminatory dismissal can be made out against them and that has no prejudice at all. The practical effect of allowing the amendment will simply be to allow the claimant to lead evidence in relation to the reasons for his resignation and also the losses flowing from that. The level of enquiries required by the respondent remains broadly similar irrespective of whether or not the amendment application is granted.

Objection to the application

24. I was referred to the background. Around 27 March 2019, Ms Coombes emailed the Tribunal about bringing a complaint of constructive unfair dismissal following the claimant's resignation on 27 March 2019. From 2 April 2019 Ms Coombes was aware that the Tribunal was treating this as an application to amend to include a claim for constructive dismissal and ordered the claimant's representative to provide the terms of the purported amendment to the Tribunal and respondent by 12 April 2019.

25. On 1 May 2019, the Tribunal wrote to the parties indicating that the time that had been allowed for the claimant to intimate the proposed amendment to the

current claim to include a complaint of constructive dismissal had passed and directing that "in the circumstances, the claimant is to prepare and present a separate claim for constructive unfair dismissal and holiday pay within the time limits. Application can then be made to combine the claim with the current claim if they are common or related issues."

26. At a further preliminary hearing on 29 May 2019, it was recorded that the claimant was seeking legal advice. it was also recorded that the claim cannot be amended to incorporate a complaint of constructive dismissal since this had already been dealt with in a direction issued in a letter of 1 May 2019. The parties were reminded that if there was to be such an application, there is a time limit which is three months less one day that is 26 June 2019 for any such claim which might also include holiday pay.

27. It has been made repeatedly clear to the claimant that he needed to present a sperate claim for constructive dismissal and that he has been made aware of the time limits for doing so. No claim was presented within the time limit despite the claimant having had the benefit of legal advice in late May/early June 2019.

28. The claimant has still not presented a claim for constructive dismissal and rather he is seeking to present a new claim by way of amendment which is significant. It is not merely a relabelling exercise but rather an attempt to add entirely new facts and a new head of claim. He appears to be bringing a new cause of action under section 39(2)(c) of the Equality Act 2010. The claimant has been aware of this for months, and it is substantially out of time.

29. There is no explanation why the claim was not presented in time particularly given the judicial guidance about what to do and when. The claimant has also had the benefit of legal advice on 28 May and 21 August 2019.

30. The prejudice to the respondent is that the impact to the respondent in terms of preparation is unknown. The respondent will need time to answer the amendment if allowed. The amendment introduces a claim that is valued at a third of the overall value of the claim. The final hearing might need to be

postponed. The prejudice to the claimant was known; it should have been considered and the application made sooner.

Relevant law

31. *Selkent Bus Company v Moore* 1996 ICR sets out the guidance as to how tribunals should approach applications for leave to amend, the requirement to carry out a 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 granting or refusing the application.

Decision

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

33. 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 refusing to make it. This involved a careful balancing exercise of all the relevant factors, having regard to the interests of justice and 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.

34. I first considered the nature of the amendment. From my reading of the claim form, the amendment application comprised a new cause of action containing new facts which post-dated the presentation of the claim form.

35. My understanding is that contrary to earlier correspondence from Ms Coombes intimating the claimant's intention to raise a constructive unfair dismissal claim the amendment is introducing a claim under section 39(2)(c) of the Equality Act 2010, the respondent has discriminated against the

claimant by dismissing him. It was agreed that this is was a substantial amendment.

36. If the claim was presented as a new claim, it would be presented out of time. There was no suggestion that the claimant was not aware of any facts or there was a delay in making the application to amend due to any response from the respondent. The claimant knew on 27 March 2019 of his right to bring a further claim and that this could be done by way of amendment or a new application. He was also aware of the time limits involved. These were expressly stated in the notes of the preliminary hearing and were asked to be brought to Ms Coombes' attention as the claimant was consulting with a solicitor on 28 May 2019. There was no explanation provided to me why the Ms Coombes or the legal representative as at 28 May 2019 did not submit a further claim form. The claimant appeared to understand time limits and the need for this to be done as quickly as possible and that throughout this process, he was represented. There was no explanation as to why it would be just and equitable to extend the time limit.

37. Turning to the timing and manner of making the application, other than Ms Coombes being overwhelmed by what she was required to do, there was no explanation why no action was taken to present a claim between 28 May 2019 and 24 June 2019 when the claimant would have been able to do so. I noted that the claimant consulted with Mr Healey on or around 21 August 2019; the further and better particulars were provided on 19 September 2019; and the application to amend made on 24 October 2019. There was a suggestion that Ms Coombes did not have all the relevant papers. It was not clear to me why this was so. In any event, if Ms Coombes was in any doubt about whether she was in possession of all the paperwork, I do not know why there was not request for the Tribunal to provide any paperwork that may be missing. There was no explanation as to why there was a delay between 21 August and 24 October 2019 in making the application.

38. It was suggested by Mr Healey that allowing the application would have very little impact on the final hearing. He inferred that if the amendment was allowed, the respondent would not have time to answer given that they had

previously intimated an amended response. From the information available to me, that response was a blanket denial in respect of a constructive unfair dismissal claim and I considered that if the application was granted, the respondent would require time in which to consider the amendment and formally respond to it.

39. Mr Healey also suggested that there would be little impact on the final hearing that had already been assigned. Mr Bradley candidly said that he did not know what impact it would have on the final hearing which is scheduled to take place in six weeks. However, the respondent would be entitled to respond and consider its position; it may possibly involve additional witnesses being called; and it may result in an application to postpone the final hearing which would delay matters.

40. I then turned to consider the interests of justice and the hardships of granting and refusing the amendment application. As indicated above, if it was allowed, I anticipate the respondent would require time in which to submit their response which would then involve speaking to witnesses about the circumstances surrounding the claimant's resignation and there is a possibility that this may affect the timing and length of the hearing that has already been assigned in January. If the amendment is not allowed, the claimant will not be able to advance that his resignation was in response to discriminatory treatment by the respondent. However, the claimant has been represented throughout these proceedings and has had the benefit of legal advice on or around 28 May 2019 and from 21 August 2019. There has been little evidence provided about why the claimant and his representative did not deal with this when the claimant became aware of the situation in March 2019 particularly when guidance was provided by numerous employment judges as to how that could be dealt with.

41. Looking at all the circumstances and balancing hardship and injustice to both parties, I concluded that the amendment should not be allowed.

Employment Judge: S MacLean

Date of Judgement: 18 December 2019

Entered in Register,

Copied to Parties: 23 December 2019