EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4102668/2019

Held in Glasgow on 27 February 2020

Employment Judge: I McFatridge

Mr M Ehidiamen	**Claimant** **In Person**
J P Morgan Bank Luxembourg SA	**Respondent** **Represented by:** **Ms D. Hay -** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(1) The claimant's application to amend his claim dated 4 February 2019 is allowed

(2) A Preliminary Hearing will take place on 5 March 2020 in Glasgow to determine whether the Tribunal has jurisdiction to hear the claimant's claim for interim relief which was submitted on 4 February 2020 and if it does to thereafter determine the application for interim relief.

(3) I issued the above decision orally to the parties following the hearing on 27 February. Both parties indicated they wanted written reasons and these are now provided below. They incorporate and expand upon the written reasons given at the hearing:

REASONS

1 The claimant presented the claim in this case on 24 February 2019. The claim is stated to be a claim of 'unlawful victimisation and discrimination in terms of section 27 of the Equality Act 2010'. I was referred to the first case management Preliminary Hearing in this case conducted by Employment Judge MacLeod on 8 May 2019. It is clear from this that the claim is under section 27 of the Equality Act; the protected act is the previous Employment Tribunal proceedings which were raised on 5 June 2017 and refer to an alleged discriminatory comment made in July 2016. The detriments are listed and are: loss of career development opportunities, loss of job opportunity in London, loss of job opportunity in Bournemouth, loss of promotion in November 2018, no career growth or development from October 2016 - ongoing and suppressed wages. I also note that, as pointed out by the claimant today, there is also reference in paragraph 21, 22 and 23 to certain further escalations to Jamie Dimon the CEO of the respondents via the claimant's MP and correspondence with HR.

2 The above is the existing claim before the Tribunal. The amendment is in terms of the letter sent in by the claimant and has been supplemented orally by the claimant during this morning's Hearing. As I understand the claim is one of unfair dismissal. There is a clear statement that he wishes to claim unfair dismissal which I take to be "ordinary" unfair dismissal in terms of s98 of the Employment Rights Act 1996. He also confirms today that he is claiming automatic unfair dismissal in terms of section 103A of the Employment Rights Act and also, from what Mr Ehidiamen said this morning, an extension to the victimisation claim essentially adding dismissal as another alleged detriment in respect of his victimisation under the Equality Act. The sole question I have to determine today is whether the amendment ought to be accepted or not.

3 As I understand it both parties are familiar with the Selkent principles which I have to apply and which derive from the case of *Selkent Bus company Limited v Moore [1996] ICR 836.* Going through these in turn it does appear to me that in other circumstances this could be a fairly inconsequential decision. It is not particularly unusual for a situation to arise where an employee is in

dispute with their employer and at some stage during the proceedings either the employee resigns and claims constructive dismissal or the employer dismisses the claimant in a way the claimant considers amounts to unfair dismissal. In those circumstances it tends to be fairly inconsequential as to whether the claimant proceeds by way of a separate ET1 claim form or a letter of amendment. In this case however I appreciate that there is a bit more to it than that.

4 So far as the nature of the claims are concerned I am satisfied they are new claims. They are claims which are not currently before the Tribunal.

5 So far as the timing is concerned they are claims which couldn't be made until the claimant was actually dismissed and if anything turns on the issue of the timing it appears that the application to amend was made extremely quickly after the decision to dismiss was intimated.

6 So far as the nature of the amendment is concerned there is an issue which the respondent has raised in relation to the way the application is framed that as it stands it is somewhat vague. There are a number of matters where the claimant will have to provide further particulars before the claim can go anywhere. The existing claim is proceeding on the basis of a protected act under the Equality Act. The claimant is now clearly referring to having made protected disclosures which is a matter governed by the Employment Rights Act. He will have to say exactly what these alleged disclosures are and also he will have to have regard to the very technical requirements of section 43B and 43C to 43H of the Employment Rights Act. That information is simply not in the application as it currently stands.

7 I have to consider the balance of injustice and hardship is this case. As I indicated before, in many ways this would be a non-issue in that if the Tribunal were to decide not to allow the application to amend but insist that the claimant provides an ET1 then it is not going to make all that much odds to either party. It may be that the overriding objective principle of seeking to avoid

unnecessary formality would tend one to prefer the amendment route but overall it would make little odds to either party which course of action is followed. In this case the matter is different because the claimant says that he will suffer serious injustice and hardship if the amendment is not allowed.

8 Before I consider this specific point however I will set out the more general points made by the parties. Looking first of all the injustice and hardship to the claimant of not allowing the amendment the claimant has referred to a delay and I think he is correct in that there will be a delay if the amendment is not allowed and he has to submit a separate ET1 but it will be relatively short. The claimant would have the additional work of having to complete an ET1 again my view is that it is probable that, no matter what, the claimant will have to provide some further particulars of his claim in any event.

9 I will come back to the point regarding the interim relief later but looking at things from the respondent's point of view the principle prejudice would appear to be in relation to the fact that the claim is not fully specified at this stage. The respondent makes a number of criticisms of the pleadings, many of which I consider to be well founded. I have little doubt that the claimant will require to considerably flesh out the legal and factual averments contained in his claim before the case is ready to proceed to an evidential hearing. On the other hand, if the claimant had decided to proceed by way of an ET1 instead of by amendment the chances are the respondents wound find themselves in exactly the same situation. It is a commonplace generality that in employment cases time limits are very short. In a case where a claimant is seeking interim relief then the time limit is even more short. It is at most 7 days from the date of dismissal. In those circumstances it is not unusual for averments in an ET1 to be somewhat terse; only setting out the bare bones of the claim. In the event that the claimant had submitted an ET1 with even less specification of his amendment then I expect the Tribunal would be saying that they would accept it on the basis that further particulars would be provided in due course so I don't see any particular hardship to the respondents as far as that is concerned.

10 I now move on to the more unusual matter raised by the parties. On the issue of interim relief it is the claimant's position that if he is not permitted to add this claim by way of amendment then he will lose his right to seek interim relief because it is now too late for him to submit an application within 7 days of the effective date of termination of his employment. He states that as a person working on an immigrant visa he has no recourse to public benefits and indeed may be required to leave the country within sixty days if he does not obtain other employment. It is therefore very important to him that he is able to pursue a claim for Interim Relief.

11 Mr Hay raised the point that, in his view, this is not a valid consideration for me because the claimant doesn't have the right to raise a claim of interim relief in any event. Mr Hay has set out a clear and in some ways compelling argument that that is the case from an analysis of the terms of s128 of the Employment Rights Act 1996 and the judgement of the EAT in the case of Galilee v Commissioner of Police of the Metropolis [2018] ICR 634. Broadly speaking Mr Hay's position is that the 'Galilee' case makes it clear in various points in the Judgment but particularly in paragraph 109 that the date of presentation of a new claim which is allowed on amendment is the date the amendment is accepted. If that is the case and I were to accept the claimant's amendment the 'date of presentation' would be today and section 128 only permits an employee to make an application for interim relief if they have presented a claim to the tribunal that one of the relevant sections applies (in this case section 103A) and therefore at the time the claimant wrote in his letter on 4 February seeking interim relief then there was no such claim before the tribunal. The claim also has to be submitted within seven date of the effective date of termination of employment so a claim presented today would be out of time.

12 I have to say I found that in some ways to be a persuasive argument however I decided that it was not a matter on which I would want to make a binding decision today not least because the claimant had not had the opportunity of fully considering and taking advice on the matter in advance of the hearing.

13 There are clearly a number of points which the claimant may wish to raise. Having looked very briefly at the 'Galilee' Judgment it is at least arguable that it is not binding but could be distinguished on the facts of the present case. In that case the additional claims were actually time barred by the date of the application to amend so therefore strictly speaking it was not necessary for the EAT to make a determination that it was the date the amendment was accepted that was relevant. It may be important that this is an EAT case but there are other conflicting authorities at EAT level. There is also an issue in that the decision appears to have been made on the basis of a consideration of the English common law doctrine of relation back. The EAT's position is that this is no longer a doctrine which is in existence because the Limitation Act 1980 puts the whole matter on to a statutory basis. Now the common law doctrine of the 'relation back' is an English doctrine and the Scottish Law on limitation of actions and the English law on limitation of actions are very different and remain very different. The Limitation Act 1980 doesn't apply in Scotland and for what it's worth the English common procedure rules don't apply in Scotland either. I have not come to any firm view on the matter but there is at least an argument to be made there and essentially I think there would be a prejudice to the claimant if I were to decide that he was not to be permitted to amend if that means that he is not able to put forward the argument that he can make a claim of interim relief and have it heard. I believe that this potential prejudice to the claimant brings the balance firmly down in favour of allowing the amendment. I believe that there is a potentially serious prejudice to the claimant in that he could lose the opportunity of (a) arguing that he can submit a claim for interim relief and (b) if he is successful in that argument having his claim for interim relief considered by the tribunal.

14 Having ruled that the amendment should be accepted I consider that the claimant's application for interim relief should (if it is competent) be heard as soon as possible. A preliminary hearing will be fixed for 10 am on 5 March 20120 in Glasgow. It will consider the preliminary issue of whether or not the claimant's application for interim relief is competently before the tribunal. If it is then the application for interim relief will be heard immediately afterwards.

Employment Judge: I McFatridge

Date of Judgement: 05 March 2020

Entered in Register,

Copied to Parties: 10 March 2020