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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4102337/2018

Held in Glasgow on 25 February 2020

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Employment Judge: R Gall

Mr A Burke

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**Claimant
In Person**

Sky Subscribers Services Limited

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**Respondent
Represented by:
Mr M Leon –
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The application by the claimant to amend the claim intimated on 4 December 2019 is refused. The case will proceed to the days of hearing set down for 10 March 2020 and the 3 subsequent days.

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2. As stated at the Hearing, in terms of Rule 62 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, written reasons will not be provided unless they are asked for by any party at the Hearing itself or by written request presented by any party within 14 days of the sending of the written record of the decision. No request for written reasons was made at the Hearing. The following sets out what was said, after adjournment, at the conclusion of the Hearing. It is provided for the convenience of parties.

REASONS

3. This case called on 25 February 2020 in order to consider the application to amend made by the claimant on 4 December 2019. The claimant appeared in person. The respondents were represented by Mr Leon, Solicitor.
4. The claim is one of constructive unfair dismissal. The claimant resigned from employment with the respondents in September 2017. The claim was presented to the Tribunal on 7 February 2018. There have been two case management Preliminary Hearings ("PH"). There has been a PH to decide whether the claimant was at the relevant time disabled in terms of the Equality Act 2010. That PH also dealt with applications by both parties for strike out and an application by the respondents for a Deposit Order as an alternative to strike out. The Hearing itself is scheduled to proceed 14 days after this PH, on 10 March and the 3 subsequent days.
5. The claimant addressed me in relation to his application to amend. His application is lengthy and in narrative form, it seemed to me. It is difficult, I found, to understand exactly what the nature of the amendment is. I kept in mind in my assessment of the proposed amendment and the arguments advanced that the claimant is unrepresented and is not a solicitor or someone with experience in the Employment Tribunal. I explained to the claimant that it was one of my roles to ensure that as far as practicable parties are on an equal footing. The terms of the proposed amendment had to come from him however. I could not act as his representative.
6. After discussion, the claimant confirmed that he sought to introduce a claim that there had been a breach of the implied term of trust and confidence, entitling him to resign. This had become his view after he had presented the claim. It was a view informed, he said, by documents seen by him around one year ago at time of the PH in relation to strike out mentioned above. He referred to those documents showing that the decision to give him a warning was predetermined and showing that there was an issue with the disciplinary process, including the appeal, due to a part of a transcript of a telephone call being omitted.

7. I obtained submissions from both parties in relation to the **Selkent** factors (**Selkent Bus Company v Moore 1996 IRLR 661**). Those were the timing of the application, the nature of the proposed amendment and the prejudice caused to one party if the amendment application was refused, as against the
5 prejudice caused to the other party if it was allowed. I had regard to those factors and to the interests of justice.
8. In my view there was a fundamental difficulty for the claimant looking to the type of claim he sought to introduce.
9. A constructive dismissal claim proceeds on the basis of repudiatory conduct
10 by a respondent which is then accepted by a claimant. A claimant resigns due to fundamental breach of contract by a respondent.
10. At present the claimant proceeds on the basis that the fundamental breach of contract was a breach of what he says were express terms of contract between himself and the respondents. He has confirmed his claim as
15 proceeding on that footing at earlier PHs. He now seeks to introduce a claim based on breach of the implied term of trust and confidence.
11. The difficulty is that, as he accepted himself, he only became aware of what he regards as a breach of that implied term well after resignation, indeed well after the claim was raised. He agrees that he did not resign because of any
20 such breach. He had no knowledge of those matters at that time.
12. I do not see that a party can say, irrespective of what facts may be found out after resignation, that any breach of contract later established is a valid basis of a constructive unfair dismissal claim.
13. Emails or documents may provide a basis for cross examination of the
25 respondents' witnesses in support of the claim made, as they may support there having been a breach of an express terms of the contract. That point would fall to be determined at the Hearing if need be. It is the actings of the respondents said to constitute fundamental breach of contract, accepted by the claimant by submitting his resignation, which are critical. Something

unknown to the claimant at time of his resignation cannot have been a reason for his resignation.

14. On that basis alone I did not see that I could grant the application.
15. In addition, the application is considered very close to the Hearing. Preparation has been commenced. Witnesses and documents are set up on the basis of the case as pled. The claimant has confirmed on different occasions that his claim is based on breach of express terms. These elements all weighed against granting the application.
16. I recognise that there will be prejudice to the claimant in that he will not be able to advance a case that he resigned due to breach of an implied term. Any such breach, if it did occur, was only something known to the claimant after resignation, however, as mentioned. I therefore do not see that the claimant would be able to get very far with this leg of claim even if allowed. There is also prejudice to the respondents if the amendment application is allowed. Cost will be incurred as answers are prepared. Further witnesses and documents may well be necessary. The diet of Hearing currently set would seem certain to have to be postponed.
17. Weighing all the relevant matters, and in particular the difficulty, if not indeed impossibility of arguing that matters unknown to him at time of resignation had led to his resignation, I concluded that the application was properly refused.
18. I am grateful to parties for making themselves available to have this Judgment delivered orally. It seemed to me to be important to deliver it orally so that each party knew where they stood in relation to preparation for the Hearing on 10 March and subsequent days.
19. Having delivered this Judgment to parties, the claimant stated that he was intending to appeal it.
20. Mr Leon then raised a case management issue which was of relevance in relation to the claim of unlawful deduction from wages. The PH had not been

5 concerned with that element of claim. Mr Leon wished clarification of what it was the claimant alleged had been unlawfully deducted from money otherwise payable to him. The date he said any deduction had occurred could also usefully be clarified, Mr Leon said. Any commission said to be due should also be subject of clarification, with information being given by the claimant as to what he said was due and why he said it was due.

21. Mr Burke said he would supply that to those instructing Mr Leon. This would be done on 27 February.

10 **22.** In relation to the hearing, Mr Leon said he would send to Mr Burke a draft list of issues. It would be hoped that there could be agreement on the issues for the Tribunal at the hearing. I confirmed that it would be very helpful to have an agreed list of issues.

Employment Judge:

R Gall

Date of Judgement:

26 February 2020

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Entered in Register,

Copied to Parties:

27 February 2020

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