EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100443/2020

Held in Edinburgh on 24 June 2020

Employment Judge: M Sutherland (in chambers)

Mr T Campbell	**Claimant** **Written submissions by:** **Ms L Neil (Solicitor)**
Powerteam Electrical Services (UK) Limited **T/a Omexom**	**Respondent** **Written submissions by:** **Ms L McCleery (Solicitor)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The application to amend the claim to include a complaint of automatically unfair dismissal is refused.

REASONS

Introduction

1. On 24 January 2020 the Claimant lodged a complaint for unfair dismissal, statutory redundancy pay and unlawful deduction from wages. In reply the Response stated that the Claimant had not been continuously employed for 2 years and accordingly the Tribunal does not have jurisdiction to consider his claim for unfair dismissal. Following a case management Preliminary Hearing on

12 May 2020 an open Preliminary Hearing was arranged for 25 June 2020 to determine the length of the Claimant's continuous service and the unlawful deduction from wages claim. On 19 May 2020 the Claimant made an application to amend to include a claim for automatically unfair dismissal which was to be determined without a hearing by refence to parties' written submissions prepared by their legal representatives.

2. The terms of the application to amend are set out in a tracked changed ET1 Paper Apart ('PA') and in summary are as follows –

    a. Para 6, PA: The Claimant was required to travel to Belfast for the meeting on 26 September. Although he was advised that he was entitled to have someone attend the meeting with him in Belfast he was not advised of the financial provision for travel costs. "He declined the opportunity to have someone to attend with him. It had not been made convenient to do so".

    b. Para 7, PA: The Claimant was called back for a further "disciplinary meeting" (amended from "consultation meeting"). He requested that meeting take place in Glasgow so that he may have someone attend. He was dismissed (amended from "made redundant"). This was not a genuine redundancy situation.

    c. Para 11, PA: "The Claimant brings a claim of automatically unfair dismissal under Section 12 of the Employment Rights Act 1996 and paragraph 13, Schedule 5 of the Employment Equality Age Regulations 2006 (SI 2006/1031). The Claimant was denied the right to be accompanied to the disciplinary hearings to which he was invited." The amendment to Para 11, PA was later revised to: "The Claimant brings a claim of automatically unfair dismissal under Section 12 of Employee Relations Act 1999. The Claimant was denied the right to be accompanied to the disciplinary hearings to which he was invited."

Relevant Law

3. In terms of Rule 29 of the Employment Tribunals Rules of Procedure 2013, the Tribunal may at any stage in the proceedings, on its own initiative or on the application of a party, make a Case Management Order. This includes an Order that a party may amend its claim or response.

4. The EAT in Selkent Bus Company Ltd v Moore [1996] IRLR 6 provided the following guidance on amendment: *"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. That discretion should be exercised in a way that is consistent with the requirements of "relevance, reason, justice and fairness inherent in all judicial decisions". That discretion also should be exercised in accordance with the overriding objective of dealing with cases fairly and justly including, so far as practicable (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.

6. The following non-exhaustive factors are relevant to the exercise of that discretion: -

    a. <u>The nature of the amendment</u>

    "*Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels of facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of a minor matter or is a substantial alteration pleading a new cause of action*" (*Selkent*).

7. There are broadly three types of amendment: 1. amendments which add to or alter the basis of an existing claim or defence ("minor"); 2. amendments which add or substitute a new cause of action or defence arising out of facts already plead ("re-labelling"); and 3. amendments which add or substitute a wholly new cause of action ("substantial").

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 the complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions*" (*Selkent*)

8. The applicable time limits do not ordinarily affect minor amendments or re-labelling exercises. For substantial amendments the Tribunal should consider whether the complaint is out of time and if so whether the time limit should be extended. This is only a factor and not wholly determinative.

9. The Court of Appeal in *Abercrombie & Others v Aga Rangemaster Ltd [2013] EWCA Civ 1148; [2013] IRLR 953* provided: "the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted".

c. The timing and manner of the application.

"*An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may 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 new information appearing from*

documents disclosed in discovery. Whenever taking any factors into account, paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision." (*Selkent)*

10. Consideration should be given to the effect of any delay on the quality of evidence, additional areas of enquiry, and the stage of the tribunal proceedings.

d. Prospects of success

Consideration may also be given to the prospects of success of the application to amend.

Claimant's Submissions

11. The Claimant's written submissions on the amendment were in summary as follows –

    a. The ET1 was submitted with the assistance of a retired solicitor who is not an employment law specialist

    b. The authority of *Selkent* should be considered. However the factors in *Selkent* were not exhaustive and were not to be applied in a tick-box fashion (*Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148*, *[2013] IRLR 953, at para 47)*.

    c. The amendment is a re-labelling exercise – "to re-label a fact relied upon by the Claimant to enable a claim for automatically unfair dismissal". The Claimant does not seek to introduce new facts. New claims should be permitted where the cause of action arises out of the same or substantially the same facts that are already in issue.

    d. His original claim had stated that the dismissal was unfair because "there were no genuine redundancies"

e. The meetings attended were not consultation meetings as originally pled but disciplinary meetings. “The change in description clarifies the Claimant’s automatically unfair dismissal claim which is made on the basis that he was not permitted to be accompanied to either disciplinary meeting”.

f. In the event it is not accepted as a re-labelling exercise it was “not reasonably practicable” to raise the new claim timeously. Details of the new claim were contained within a file in the previous representative’s basement which was not accessible because of flooding and delayed remedial action aggravate by the coronavirus. Under 5 months have elapsed since the ET1 submission.

g. No final hearing has been arranged and is unlikely in the immediate future because of coronavirus.

Respondent’s Submissions

12. The Respondent’s written submissions on the amendment were in summary as follows –

a. The Claimant was offered the right to be accompanied even though there was no statutory obligation to do so given that this was redundancy consultation

b. The Claim did not reference a statutory right to be accompanied and did not state that his dismissal was connected in any way connected to that right.

c. The relevant facts were within the Claimant’s knowledge. The claim for automatically unfair dismissal was conveyed by the representative who was on record when the claim was lodged. The change of representative arose on 20 March 2020.

d. The amendment is relevant to the need for a substantive hearing being held in June 2020.

e. The claim has no reasonable prospects of success: the claimant was not attending a disciplinary meeting and had no right to be accompanied.

f. The details provided in the amendment lack the necessary specification to establish a claim for automatically unfair dismissal. The Claimant does not narrate the causative link between the right to be accompanied and the dismissal.

g. There are wholly new factual allegations requiring wholly different evidence

Discussion and decision

13. The following factors were considered relevant to the exercise of the discretion as to whether to grant or refuse the application to amend to include a claim of automatically unfair dismissal under Section 12 of the Employee Relations Act 1999.

a. The nature of the amendment

In the original claim the Claimant asserts that there was "no genuine redundancy situation". It is possible to infer from this that he was asserting that the reason for his dismissal was not redundancy but no alternative reason was asserted. In the original claim there was no assertion that he was being asked to attend a disciplinary hearing (he described this as a redundancy consultation meeting) and there was no assertion that he had a right to be accompanied (merely that he no opportunity to contact someone to attend). The proposed amendment that he was being required to attend a disciplinary hearing (and not a redundancy consultation meeting) and that he sought to exercise a statutory right to be accompanied to that disciplinary hearing (not merely that he had no opportunity to contact someone) is a substantial alteration.

14. Para 11, of the amended PA provides: "The Claimant brings a claim of automatically unfair dismissal under Section 12 of Employee Relations Act 1999. The Claimant was denied the right to be accompanied to the disciplinary hearings

to which he was invited.” The Claimant in his submission confirms: “The change in description clarifies the Claimant’s automatically unfair dismissal claim which is made on the basis that he was not permitted to be accompanied to either disciplinary meeting”. The Claimant does not assert that the reason he was dismissed was that he sought to exercise his right to be accompanied. As regards the reason for the dismissal, the Claimant submission that he seeks to introduce no new facts is correct.

15. A claim for automatically unfair dismissal would have involved substantially different areas of enquiry: whether the claimant was being called to a disciplinary hearing (rather than a consultation meeting); whether he sought to exercise his right to be accompanied (not merely that he had no opportunity to contact someone); and whether the reason or principal reason for his dismissal was that he had sought to exercise his right to be accompanied (rather than because his position was redundant or some other substantial reason).

b. The applicability of time limits.

A complaint in respect of a failure to comply with the right to be accompanied, and/or for automatically unfair dismissal, must be made within 3 months or such further period as the tribunal considers reasonable where it is satisfied that it was not reasonably practicable for the complaint to be presented within 3 months. The date of dismissal is in dispute: the Claimant asserts that date is 27 December 2019; the Respondent asserts that the date is 26 September 2019. It is understood that the Claimant is asserting that he was summarily dismissed on 26 September 2019 but this was in breach of his entitlement to 3 month’s notice. The Claim for ordinary unfair dismissal was lodged on 24 January 2020 and the amendment was lodged on 19 May 2020 (8 months after the purported summary dismissal). Accordingly a factor to consider is that any claim for automatically unfair dismissal there may be would be out of time unless the reasonably practicability extension applies.

c. <u>The timing and manner of the application.</u>

The Claimant submits that the application is being made now because the details of the claim for automatically unfair dismissal were in a file held by the previous representative which was not unavailable until May 2020. We have not been advised what those details were. The original representative made the claim for unfair dismissal and did not include details of a claim for automatically unfair dismissal or facts relevant to such a claim. The facts relevant to any claim for automatically unfair dismissal would be known to the Claimant and could readily have been established by the current representative in discussion with their client following their appointment in March 2020. It was reasonably practicable for any such claim to have been made in April 2020 if not before. Instead the application to amend was made in May 2020, one month prior to substantive hearing on whether the Claimant had sufficient service to pursue a claim for unfair dismissal.

d. <u>Prospects of success.</u>

The amendment if allowed does not disclose a claim for automatically unfair dismissal. The Claimant does not assert that the reason, or principal reason, that he was dismissed was that he sought to exercise his right to be accompanied. Separately the Claimant does not assert a factual basis upon which it could reasonably be inferred that he was being called to a disciplinary hearing, that he sought to assert a statutory right to be accompanied, and that the reason or principal reason for his dismissal was the assertion of that right. The claim for automatically unfair dismissal has no reasonable prospects of success.

16. The granting of the amendment would require the Respondent to undertake additional preparatory work in respect of an amendment which does not disclose a claim for automatically unfair dismissal and which on the basis of the information provided has no reasonable prospects of success. The refusal of the amendment prevents the claimant bringing a claim of automatically unfair dismissal but does

not prevent the Claimant from maintaining his argument that he has requisite service to claim ordinary unfair dismissal. Having regard to the substantial nature of the amendment, the delay in brining that claim and its prospect, and balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, the application to amend to include a claim for automatically unfair dismissal is refused.

Employment Judge: M Sutherland
Date of Judgement: 24 June 2020

Entered in Register,
Copied to Parties: 24 June 2020