EMPLOYMENT TRIBUNALS

Claimant	***Respondents***
Ms Susan Welsh	St Clare's Hospice (in creditors voluntary liquidation) (R1)
	The Secretary of State for Business, Energy and Industrial Strategy (R2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE ON 5 March 2020
EMPLOYMENT JUDGE GARNON (sitting alone)
Appearances
For the claimant Mr P Kerfoot of Counsel
For the respondents No attendance

JUDGMENT

The Judgment of the Tribunal is:
1. The claim is amended, without the need for re-service, to add a reference as to the right to a redundancy payment and a claim of breach of contract.

2. The claim against the second respondent is withdrawn but will not be dismissed.

3. The complaint under s 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") is well founded. I make a protective award in respect of the claimant who was dismissed as redundant on 21 January 2019 ordering R1 to pay remuneration for the protected period which shall begin on that date and be for 90 days. The Recoupment Regulations apply to this award.

4. The claimant is entitled to a redundancy payment of **£1702.50**

5. The claim of breach of contact (wrongful dismissal) is well founded. I award damages of **£1175** gross of tax and National Insurance

REASONS

1. R1 is a charitable company which dismissed its workforce of over 20 people on 21 January 2019. It was made subject of creditors voluntary winding up. The Secretary of State was served

with a copy under rule 96 of the Employment Tribunal Rules of Procedure 2013 (the Rules) and later made a party. I am grateful for his representations which I have taken into account.

2.The claim form was presented on 16 May 2019 after Early Conciliation within the time limit for a all the claims. It ticked no box in Part 8. The leading authority on amendment is Selkent Bus Company –v-Moore . The well-known passage in Mummery J's Judgment in that case is:-

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. What are the relevant circumstances? It is 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 substitution of other labels for 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 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 should be extended under the applicable statutory provisions,

*(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 – for, 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 on discovery. Whenever taking any factors into account,* ***the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment.*** *.".*

3. In Abercrombie v Aga Range Master Limited 2013 IRLR 953 at paragraph 47 Lord Justice Underhill cited the whole of the passage quoted above from Selkent and continued:-
"If the final sentence of point 5(a) (the nature of the amendment paragraph) is taken in isolation it could be understood as an indication that the fact a pleading introduces 'a new cause of action' would of itself weigh heavily against amendment. However it is clear from the passage as a whole Mummery J was not advocating so formalistic an approach. He refers to 'The … substitution of other labels for facts already pleaded' as an example of the kind of case where (other things being equal) amendment should readily be permitted – the contrast being with 'the making of entirely new factual allegations which change the basis of the existing claim'. (It is perhaps worth emphasising that head 5 of Mummery J's guidance in Selkent was not intended as prescribing some kind of a tick box exercise. As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head 4).

Consistently with that way of putting it, 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.*** *It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts already pleaded permission will normally be granted …".*

4. The claim form was drafted by the claimant with help from someone at "Unionline". From the account she gave today, she was unwittingly misinformed as to what she should claim by proceedings in the Tribunal ,what and more importantly when, she could claim directly from R2,. The provisions of Part 12 of the Employment Rights Act 1996 (ERA) as to which debts of insolvent employers should be paid by R2 and when they become payable are so complex they are rarely understood by many advisors, let alone unrepresented claimants. On the facts in her claim form the circumstances of her dismissal would give rise to entitlements to a redundancy payment, notice pay, unpaid wages up to termination and, as well as a protective award. R1 had some relationship with the local NHS Trust which ex gratia paid wages due and the claimant also received from someone her holiday pay. She asked R2 for notice and redundancy pay but was told her claim was out of time. I am aware of no time limits as such , but then it dawned on me she had probably been told her claim was too soon at least in respect of the redundancy payment .

5. Taking all matters into account no injustice is done by adding two heads of claim and dealing with them without re-service. R1 has not participated in this case for understandable reasons. R2 has simply asked the Tribunal to ensure the claimant is lawfully entitled to any sums she asks the Tribunal to award and said her claims against it are premature. All employees pay more National insurance than the self employed and one reason for that is their entitlements to redundancy and Part 12 payments from R2 if their employer is insolvent. Now she has this judgment, the claimant should apply to R2 again. The Employment Tribunal Rules of Procedure 2013 include

51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application the respondent may make for a costs, preparation time or wasted costs order.

52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal ***shall*** *issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—*

(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or

(b) the Tribunal believes to issue such a judgment would not be in the interests of justice.

The word "shall" is mandatory. Unless one of the exceptions applies I must issue a dismissal judgment. Because the claimant may need to pursue a claim against R2 if it does not pay , up to the limits in Part 12, I am satisfied there is a legitimate reason for withdrawal and it is *in the interests of justice* to permit that without dismissal.

6 Turning to the substantive claims , sections 188 (1) and (1A) of TULRCA provide that where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or by measures taken in connection with those dismissals. Section 188(1B) (a) says consultation must be with a recognised union if there is one, but there was not Neither were there elected or established representatives. As there were none individual affected employees can complain , Mercy-v-Northgate HR Ltd 2008 ICR 410. Independent Insurance-v-Aspinall 2011 ICR 1234 held they can claim on their own behalf, only trade union and employee representatives to obtain awards on behalf of a group of affected employees.

7. Section 189, so far as material , says where an employer has failed to comply with a requirement of section 188 and there was no recognised union ,elected or other representatives a complaint may be presented to an employment tribunal by any of the affected employees or by any of the employees who have been dismissed as redundant. Section189 (1B) says *On a complaint under sub-paragraph (1)(a)* ***it shall be for the employer to show that the requirements in section 188A have been satisfied***. I am satisfied the claimant falls in this category and worked with over 20 others at one establishment all of whom were dismissed without consultation If the tribunal finds the complaint well-founded it may make a protective award. In the absence of reasons to make one for a shorter period, Susie Radin Ltd-v-GMB 2004 ICR 893 held the award should be for 90 days

8. The claimant was continuously employed for 5 years . The common law provides employment may be brought to an end by notice. For dismissal without such notice damages are the pay the claimant would have earned during the notice period The claimant's weeks pay was £235 and under s86 ERA her minimum entitlement to notice was 5 weeks .5 x £235 = **£1175**

9. The law of redundancy payments is in Part XI ERA The amount is based on a "week's pay", date of birth and length of service. She is entitled to one and a half week's pay for each year of continuous employment during which she was over the age of 41. 5 x 1.5 x £235 = **£1702.50.**

TM Garnon Employment Judge
Date signed 6 March 2020