EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4113759/19 (P)

Held on 9 July 2020

10 **Employment Judge N M Hosie**

Mr M Watson	**Claimant** **In Person**
Pegasus Express Limited	**Respondent** **Represented by** **Mr G Millar,** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that: -

1. the claimant's application to amend is refused; and

30 2. the claim is dismissed.

REASONS

Introduction

35 1. The claimant submitted a claim form on 29 November 2019 in which he intimated a claim of unfair dismissal. He was not represented. He completed and submitted the claim form himself. The respondent admitted that they had dismissed the claimant on 9 September 2019 but claimed that the reason was

capability and that it was fair. Further, in the response form, which was submitted on 31 December 2019, the respondent's solicitor took the preliminary point that the Tribunal did not have jurisdiction to hear the claim as the claimant did not have the requisite two years' continuous service, having been only employed by the respondent since 23 April 2018.

2. The response form was duly intimated to the claimant by the Tribunal on 8 January 2020; on 9 January the Tribunal wrote to the claimant with a request that he provide the basis for his unfair dismissal claim as he had less than two years' service.

Application to amend

3. The claimant responded by e-mail on 10 January. The following is an excerpt: -

> "*I refer to the above case and your e-mail dated 9th January 2020 in which more information is requested.*
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> *Having reviewed my application I note that I have mistakenly made an application for a hearing for "Unfair Dismissal", this has been done in error by me. I mistakenly assumed that this was the correct "claim type" and chose this option from the "drop down" list on my on-line application. I now realise that "unfair dismissal" is a specific term and not a generic term whereby I felt I had been "wrongly dismissed".*
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> *I would wish to state that I feel my dismissal was due specifically to disability discrimination owing to a foot injury I received at work. I understand that the 2 year in employment specification does not apply in such cases and I wish to proceed in this matter on this basis.*"

4. This was taken to be an application to amend the claim form by substituting a claim of disability discrimination for unfair dismissal.

5. On 14 January 2020, the Tribunal received the claimant's response to the respondent's response form along with a "time line". This comprised principally a dispute of the facts, but the claimant also provided information

about "experiencing severe pain" in his right foot at the end of each working day in June/July 2019. He claimed that, *"this pain was being caused when using the hydraulic pallet truck whilst loading and unloading palleted goods from the deck of my 7.5 tonne lorry".*

6. On 21 January, the respondent's solicitor sent an e-mail to the Tribunal to intimate that the claimant's application to amend was opposed. He also intimated that, in any event, it was not accepted that the claimant was disabled in terms of the Equality Act 2010 ("the 2010 Act").

7. By e-mail dated 23 January 2020, the claimant was directed by Employment Judge Wiseman to, *"set out in detail the nature of his disability and to produce any written information he has regarding this disability".* The claimant responded by letter dated 31 January 2020 and provided copies of his records from NHS Highland.

Preliminary Hearing

8. On 17 February 2020, a Notice was sent to the parties by the Tribunal to advise that a preliminary hearing would be held on 5 May 2020 at the Aberdeen Tribunal office to consider and determine whether the claimant should be granted leave to amend to add a claim of disability discrimination.

9. On 6 April 2020, in response to a request from the respondent's solicitor, the claimant sent an e-mail to the Tribunal with details of his alleged disability. The following are excerpts: -

> "*1. I am advised by my Doctor (Dr. Abamu – Strathpeffer Medical Centre) that I suffer from excess Uric Acid which has caused me to suffer from Gout/Arthritis in my right foot……………………………………………………..*
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> *3. My gout/arthritis has no great detrimental effect on my day-to-day activities – especially now that I have been unemployed since 9 September 2019. If I walk a long distance, perhaps over two miles, there is a slight pain in my right foot. The pain in my foot was caused to a great extent by the twisting and turning motion applied to it whilst I operated a hydraulic pallet truck on the*

bed of the 7.5 tonne lorry I was using. This is why I requested and was given a change of vehicle………………………………………………………………

5. *The incident which resulted in my visit to Raigmore Hospital on 27 July was a fall/slip from the step of my 7.5 tonne lorry step. This was not an injury which caused me to seek alternative employment within Pegasus Express Limited. My pain and discomfort which made me ask for a transfer onto a smaller vehicle started several weeks before this fall, however, whilst being examined at the hospital, the Doctor felt (and indeed mentioned in his notes) that I may be suffering from Gout in my right foot which the fall/slip has agitated.*

6. From time to time, perhaps once or twice per week for 4/6 hours on each occasion, I suffer from pain in my right foot which has now been identified as excess Uric Acid leading to Gout. However, the pain is not so great that I cannot walk or drive."

10. The claimant also submitted "notes" from his Doctor along with a letter to the Tribunal of 9 April 2020.

Case management preliminary hearing on 5 May 2020

11. Unfortunately, it did not prove possible to conduct the preliminary hearing, which was scheduled for 5 May, due to the effect of the Covid-19 Pandemic. Instead, a preliminary hearing was held by telephone conference call to consider the management of the case and further procedure. The Note which I issued following that Hearing is referred to for its terms. It was agreed that I would consider and endeavour to determine the two preliminary issues raised by the respondent's solicitor, by way of written submissions and the previous written correspondence from the parties.

Respondent's submissions

12. The submissions by the respondent's solicitor were attached to his e-mail of 6 May. They are referred to for their terms.

Application to amend

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13. The respondent's solicitor submitted that the disability discrimination claim was a *"new claim".* He submitted that there was, "*not even a hint of disability discrimination in the claim form"* and he disputed the claimant's contention that he, *"always meant to include a claim of disability discrimination, but simply forgot to tick the box".* He submitted that: -

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"*It is clear to me that the claimant is aggrieved about an apparent agreement he had reached with the respondent's depot supervisor to change from driving the 7.5 tonne vehicles to the smaller vehicles, which would have avoided the claimant needing to keep up his Driver Certificate of Professional Competence ("CPC"). He has stated in the second paragraph of 8.2 that: 'I feel I have been unfairly dismissed as I had been advised I could change the vehicle I was to drive….'"*

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14. He further submitted that: -

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"*His entire case was based upon feeling he had some contractual agreement to switch vehicles and when that purported agreement did not happen, he felt that he had been unfairly or, in his words, 'wrongfully' dismissed. That is the clear language used with his claim form.*"

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15. In support of his opposition to the proposed amendment, the respondent's solicitor submitted that in the original claim: -

"There is no mention of: -

1. him having a disability (beyond reference to a minor accident at work which did not require any time off);

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2. him considering that he has been discriminated on the grounds of any disability;

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3. him considering that he has suffered a detriment because of, or on the grounds of, or arising from that disability;

4. him suggesting that he has suffered harassment because of his alleged disability;

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5. him comparing himself to a non-disabled employee;

6. him considering that a practice, criterion or provision in place at the respondent placed him at a substantial disadvantage because of his disability; or

7. the respondent having failed to comply with any duty to consider reasonable adjustments;"

16. The respondent's solicitor challenged the claimant's contention that it was simply an oversight on his part not to bring a disability discrimination claim. Section 8.1 in the claim form should have reminded him that he had to set out the claims he wished to make but he ticked the box for unfair dismissal only. He did not tick the box for disability discrimination. He was also asked at section 12, "Do you have a disability" and he ticked the box that said "no".

17. The respondent's solicitor submitted that, "*this entirely new claim has been manufactured after the event, rather than being in the mind of the claimant when submitting his claim form.*"

18. In further support of his submission, he referred to the following passage from the Judgment of the EAT in ***Chandhok v. Tirkey*** [2015] ICR 527: -

"*The claim, as set out in the ET1 is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.*"

19. The respondent's solicitor also referred to the guidance in the following cases:-

Cocking v. Sandhurst (Stationers) Ltd [1974] ICR 650;
Selkent Bus Company Ltd (t/a Stagecoach Selkent) v. Moore [1996] IRLR 661.

"**Nature of the amendment**"

5 20. In support of his submission that this was an entirely new claim the respondent's solicitor referred to ***Ali v. Office of National Statistics*** [2004] EWCA Civ 1363.

"**Applicability of time limits"**

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21. He submitted that the "new claim" of disability discrimination was out of time and that this required to be taken account of when considering whether or not to allow the amendment.

15 22. In support of his submission, in this regard, he referred to ***Amey Services Ltd & Another v. Aldridge and ors*** UKEATS/007/16;

23. So far as the Tribunal's discretion to extend the time limit in terms of s.123(1)(b) of the 2010 Act was concerned, the respondent's solicitor referred
20 to the following cases:-

Hutchinson v. Westward Television Ltd [1977] IRLR 69;
British Transport Police v. Normal UKEAT/0348/14;
Bexley Community Centre (t/a Leisure Link) v. Robertson [2003] EWCA Civ 576.

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24. The respondent's solicitor also reminded me that the onus is on the claimant to establish that it would be "*just and equitable"* to extend the time limit and this he had failed to do.

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Disability status

25. The respondent's solicitor disputed that the claimant was disabled in terms of s.6 of the 2010 Act.

26. The respondent's solicitor submitted that the claimant had been asked by the Tribunal on 23 January 2020 to provide details of his alleged disability, but he failed to do so. The respondent's solicitor then set out in his written submissions the claimant's answers to the nine questions which he had posed, in relation to the alleged disability, in his e-mail of 7 February 2020. The claimant had resisted this request initially and only responded when the respondent's solicitor requested an Order from the Tribunal on 6 April 2020.

27. The respondent's solicitor referred to the definition of disability in s.6 of the 2010 Act. He submitted, with reference to ***Goodwin v. Patent Office*** [1999] IRLR 4, that the Tribunal should consider the various elements of the definition separately and sequentially. He also referred to "Guidance on Matters to be taken into Account in Determining Questions relating to the Definition of Disability".

28. He submitted that: "*With respect, the claimant has a very minor condition, which causes no significant or substantial impact on his ability to carry out normal day-to-day activities. I appreciate that the purpose of today is not to consider whether the claimant is disabled and although I also appreciate that in recent years there have been less hearings required to determine whether someone is disabled or not, in this case, I am firmly of the view that the claimant would not meet that definition, therefore would be insisting on a preliminary hearing to determine that question should the application to amend be granted.*"

Conclusion

29. Finally, the respondent's solicitor said this by way of conclusion. He referred to the "overriding objective" in the Rules of Procedure. He submitted that while the claimant is not legally represented and that these were "*technical legal issues…………..it is the claimant's choice not to avail himself of legal advice………………………………………………………………………………*

In my submission he has not set out any grounds as to why his application should be accepted. He has not provided any specification of his alleged discrimination claims and he has not provided any argument or evidence that it would be just and equitable to extend the time limit, not because he is not legally represented, but simply because there are no good reasons for allowing his proposed amendment.

The claimant may have been advised by someone answering the phone in the Tribunal office that an amendment is a straightforward exercise and in the main it generally is, but the fact that this is an entirely new claim, which cannot be inferred from his alleged facts and the fact that he is out of time in lodging that discrimination claim has made this a complex and important issue."

30. Finally, the respondent's solicitor submitted that were I to allow the amendment the respondent would be put to considerable cost defending the claim and that it would be the respondent who would suffer the "*greater prejudice*".

Claimant's submissions

31. The claimant's submissions were made by letter dated 8 May 2020. These are referred to for their terms.

Application to amend

32. The claimant disputed that the disability discrimination complaint was a "new claim". He included with his submissions a letter which he had sent to the respondent on 20 September 2019 following his dismissal. The letter was prepared with the assistance of the local Citizens Advice Bureau ("CAB") and in the letter, he alleges "disability discrimination".

33. The claimant maintained that when he ticked the unfair dismissal box in the claim form, he did not realise that unfair dismissal is a "*specific term with regard to employment law and does not cover a multitude of grievances*". He claimed that he, "*simply believed that the term 'unfair dismissal'* was a *"cover all statement".* He also submitted that he, "*thought of 'being disabled"* as being wheelchair bound or being required to use a stick to walk, or having such impairment, however, as this matter progressed, "*I realise that insofar as the Equality Act 2010 is concerned 'I am 'disabled', in so far as I had albeit undiagnosed at the time, a medical condition which had a substantial and long term effect on my ability to carry out day-to-day activities, including, and most importantly in this matter, my then working role with the respondent and use of the hydraulic pallet truck.*"

34. The claimant maintained that he was aware that two years' service was required for a claim of unfair dismissal and "*wrongly assumed that in cases where the unfair dismissal was due to a disability that two years' service requirement was waived*."

35. He further submitted that when the issue of jurisdiction was raised with him by the Tribunal by letter dated 9 January that he telephoned the Employment Tribunal office and that he was advised by "*Robbie or possibly Ronnie*" that this could be amended without the need to resubmit the entire claim from the beginning.

Time limit

36. The claimant also submitted that if the view was taken that the claim was out of time, the Tribunal should exercise its discretion and extend the time limit as it would be *"just and equitable"* to do so. The claimant maintained that following his dismissal he had made "*many attempts*" to make contact with the respondent to "*resolve this matter…..prior to being put in a position where legal recourse was necessary*". However, the respondent failed to respond,

and he took advice from the CAB which resulted in him sending the letter on 20 September 2019 to the respondent. Further correspondence ensued between the claimant and the respondent which ended on 12 October 2019 when he was advised by the respondent that the matter was "*at an end*". He submitted that his application to amend on 10 January 2020 "*is only 12 days outside of the time limit for the bringing of such claims*" and that it would just and equitable to extend the time limit in these circumstances.

Disability status

37. The claimant submitted that he has "*gout which is a physical impairment*" and that this condition was "*suspected as far back as 27 July 2019*" when he went to hospital after he had fallen from his vehicle whilst at work. He was prescribed a pain killer at the hospital and had "*self-medicated with ibuprofen painkillers thereafter*". He accepted that the last day he used the 7.5 tonne lorry and the associated hydraulic pump truck, was Friday 6 September 2019. He submitted that this was, "*a convenient day to desist operating this vehicle as my current CPC card expired on Monday 9 September 2019.*"

38. He explained that it was not until March 2020 that he received a diagnosis of gout. Until then he had believed that the discomfort he was experiencing was, "*perhaps caused by a sprain or strain caused by my use of the hydraulic pallet truck within my 7.5 tonne lorry.*"

39. He explained that gout "*is a form of arthritis which causes extreme pain and discomfort in my right foot.*"

40. He claimed that the respondent had failed to respond to two requests to provide him with the notes which were taken during his interview at the Inverness depot following his "*slip/fall*".

41. The claimant further submitted that the effect of the impairment was "*substantial*". He submitted that the effect was "*more than minor or trivial.*" The following is an excerpt from his submissions: -

"*My gout had a substantial and long-term effect on my ability to carry out day to day activities and what at that time was my daily work at Pegasus Express Ltd and in particular, the use of the hydraulic pallet truck within the bed area of the 7.5 tonne vehicle I was responsible for operating. I had mentioned several times to both John Mowatt and other fellow employees at the Inverness Depot that I had been experiencing extreme pain in my right foot during and following the use of the hydraulic pallet truck on my daily work routine to the extent that, upon returning home after work each day, I would have to elevate my right foot and apply a cold compress to reduce pain and swelling. I was also self-administering Ibuprofen as a pain killer as I had not, at that time been diagnosed with Gout, I assumed that the pain was a simply sprain/strain to my foot following the daily use of the hydraulic pallet truck.*

I have, to the best of my recollection, taken around 5 or 6 days off work during the period April-September 2019. I certainly recall on one occasion having to take perhaps 2 days off work during that period as a result of a kidney infection, however, I certainly have been obliged to take time off sick as a result of severe pain in my right foot as a result of what was at the time undiagnosed Gout.

Whilst employed with the respondent, my wife and I were engaged as Volunteer Street Pastors during the evenings in Inverness City Centre, unfortunately, I had to resign, from this position as it became increasingly difficult for me to walk any distance before encountering extreme pain in my foot.

I regularly endure pain in my right foot which awakens me from sleep during the early morning and requires me to elevate my foot and apply cold compresses to reduce pain and swelling. I am able to walk distances of around half a mile or so before any discomfort commences and I am still able to drive, albeit my car is automatic and is fitted with cruise control which is of assistance to me. I cannot operate a lawn mower for any period of time without experiencing pain and discomfort. I have sadly had to desist from my hobby of fly fishing as I am unable to walk across what is invariably rough terrain for any distance. This condition has significantly worsened recently and is now impacting on my day-to-day life.

My condition is best described as fluctuating and sporadic, that is to say, the severity and length of attacks varies greatly, nonetheless, it is a condition which is increasingly causing me severe discomfort and pain and as a result of this I now find myself unable to undertake what one year or so ago what would have been straightforward and routine such as grocery shopping with my wife or walking our dog. On each occasion I have attempted these activities in recent months I have endured extreme pain and discomfort and

been obliged to take pain killers in addition to my medically prescribed Allopurinol."

Long-term effect

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42. The claimant submitted that he has suffered pain and discomfort, "*for around 14 months now*" and that he will require to take medication "*for the foreseeable future*"

10 **Summary**

43. The claimant maintained that he was dismissed, "*through no fault of my own".* He claimed that due to his gout he was prevented from continuing in his role as a Heavy Goods Vehicle Driver and in particular using the hydraulic pallet
15 truck associated with this class of vehicle.

44. He claimed the respondent was aware of his condition and it had been agreed that he would be transferred to another smaller vehicle, "*thus eliminating the heavy and constant use of the hydraulic pallet truck*". However, he accepted
20 that there was no written agreement, only "*simply a verbal agreement with John Mowatt who is responsible for the day-to-day operations of the Inverness Depot.*"

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Discussion and Decision

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Application to amend

45. In ***Cocking v. Sandhurst (Stationers) Ltd & Another*** [1974] ICR 650, Sir John Donaldson, when delivering the Judgment of the NRIC, laid down a general procedure for Tribunals to follow when deciding whether to allow substantial amendments. These guidelines have been approved in several subsequent cases and were re-stated in ***Selkent Bus Co. Ltd v. Moore*** [1996] ICR 836. In that case, the EAT emphasised that the Tribunal, in determining whether to grant an application to amend, must carry out a careful balancing exercise of the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to parties by granting or refusing the amendment. Useful guidance on this issue was also given by the EAT in, ***Argyle & Clyde Health Board v. Foulds & Others*** UKEATS/009/06/RN and ***Transport & General Workers' Union v. Safeway Stores Ltd*** UKEAT/0092/07/LA.

46. In both cases, the EAT referred, with approval, to the terms of paragraph 311.03 in section P1 of Harvey on Industrial Relations in Employment Law: -

"***(b) Altering Existing Claims and Making New Claims [311.03]***

A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint; (ii)amendments which add or substitute a new cause of action which is linked to, or arises out of the same facts, as the original claim; and (iii) amendments which add or substitute a wholly or new cause of action which is not connected to the original at all."

47. Valuable guidance was also provided by Mummery LJ at pages 843 and 844 in ***Selkent***: -

"*……………………………………………………………………………………….*

(4) 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 the amendment against the injustice and hardship of refusing it.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

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Applications to amend are of many different kinds ranging, on the one hand from the correction of clerical and typing errors, additions of factual details to existing allegations and the addition or substituting a further label for facts already pleaded to, to on the other hand, making of entirely factual allegations which change the basis of the existing claims. 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 could be extended under the applicable statutory provisions e.g. in the case of unfair dismissal s.67 of the Employment Protection (Consolidation) Act 1978.

(c) The timing and the manner of the application

An application should not be refused wholly because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 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 and 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 amendments. Questions of delay, as a result of adjournment and additional costs particularly if they are enlightened to be recovered by the successful party, are relevant in reaching a decision."

Present case

"The nature of the amendment"

48. The claimant drew to my attention in his submissions the letter he sent to the respondent on 20 September 2019, after his dismissal, in which he made reference to "disability discrimination". He was aware, therefore, that such a claim could be advanced. He had the benefit of advice from the CAB and it is clear from his written submissions alone, he is well able to articulate his position and his intentions.

49. However, in the claim form he ticked the unfair dismissal box at para. 8.1 to intimate that was the claim he wished to make; he made no reference at all to a claim of disability discrimination in the details of his claim at para. 8.2; there are no averments to support such a claim at para. 8.2; he chose not to tick the box at para. 8.1 to indicate that he wished to make a claim of discrimination; he chose not to take the box at para. 8.1 to indicate that he wished to indicate a claim of discrimination on the ground of disability; and, significantly, he even ticked the box at para. 12.1 to intimate that he did not have a disability.

50. I am of the view, therefore, that the disability discrimination claim is a new cause of action. It is a new claim. It is a substantial alteration. It was only advanced when the claimant was advised that he did not have the required two years' continuous service to bring an unfair dismissal claim. It appears to me that the application to amend to introduce a claim of disability discrimination was something of an afterthought, when he realised he had no other options.

51. I was also mindful of the guidance of the EAT in ***Chandhok***, to which I was referred by the respondent's solicitor, that the claim form is, *"not something just to set the ball rolling"*; it is not something which a claimant is, *"free to augment"* by adding or subtracting claims, *"merely upon their say so".*

"**The applicability of time limits**"

52. The claimant applied to amend to bring a disability discrimination claim instead of an unfair dismissal claim on 10 January 2020. He was dismissed on 9 September 2019. The application to amend is out of time, by some 12 days, as the respondent's solicitor submitted.

53. So far as extending the time limit is concerned, while I do not believe that the cogency of any evidence will be adversely affected by the delay and while the claimant is unrepresented, he did have the benefit of advice from the CAB and, as I recorded above, he appears to be well able to articulate his claim. I was also mindful of the relevant case law, that the burden is on the claimant and that the exercise of discretion to extend the time limit is the exception, not the rule (***Bexley***). I accept the submissions by the respondent's solicitor that the claimant has provided, "*very little evidence as to why he did not submit his claim in time*". There is no apparent impediment to him so doing. Had I just been required to determine the time bar issue in isolation, therefore, I would not have extended the time limit as I do not consider it would be *"just and equitable"* to do so. However, for the purposes of considering an application to amend, time bar is not determinative, as Mummery LJ said in ***Selkent***. It is but a factor to be considered, in the round, albeit an important one.

"**The timing and manner of the application/prejudice and hardship**"

54. Although some allowance requires to be made for the fact that the claimant is unrepresented, he did have the benefit of advice from the CAB and if he wished to bring a disability discrimination claim he should have set that out in the claim form.

55. I do not know if the claimant was advised by someone at the Tribunal office in Glasgow that he could apply to amend and would not have to submit a new claim form. Strictly speaking that is correct, procedurally. However, it is significant that the claimant does not say that he was advised that the

amendment would be allowed. Indeed, I would be extremely surprised if he was so advised, as that is a judicial decision and the Tribunal Clerks are well aware that they should never give advice. In any event, this is nothing to the point. For, even if the claimant had raised a fresh claim, it would have been out of time and, as I record above, I would not have been minded to extend the time limit.

56. Further, the claimant has not sought to apply to amend the factual basis for his claim of disability discrimination and the averments in the claim form are wholly insufficient to support such a claim. The basis for his claim is an alleged agreement with the Depot Supervisor, John Mowat, that he would be "transferred to drive a 3.5 tonne van" which meant that he would not require a "CPC Drivers Card". However, this is denied by the respondent; the claimant accepts that there is no written agreement, only his bald assertion that this was "verbally agreed"; and there is no specification of when, how and the circumstances in which, the alleged agreement was reached.

57. If I were to allow the amendment, therefore, the claimant would require to amend further to provide specification of the sections in the 2010 Act relied upon, along with the supporting facts.

58. The respondent would then have to be afforded the opportunity of responding in writing, which would involve additional costs which the respondent would be unlikely to recover from the claimant, even if they are able to successfully defend the amended claim.

59. There is also the additional factor of "knowledge", particularly if a s.15 claim is to be advanced. The claimant does not assert the respondent had knowledge of his alleged disability at the relevant time. In the claim form, he only refers to a "*foot injury*" which, as I understand it, he believed at the time had been caused by an accident at work. There is no reference anywhere in the claim form to "gout". Further, in the claim form he intimated that he did not have a disability. He ticked a box to that effect. It is difficult to envisage,

therefore, how he would be able to establish that his dismissal occurred because of his disability or something arising from his disability, when the respondent had no knowledge of it.

5 60. Indeed, the claimant now maintains that his gout is the impairment he relies upon, but that was only diagnosed after his dismissal. Nor is there any suggestion that the respondent should have been aware of his alleged disability. For example, there is no allegation that he alerted the respondent to the extent of his alleged impairment or of the respondent considering a
10 possible referral to Occupational Health, which might have been expected if, as he alleges, the respondent agreed to an "adjustment" to his duties so that he would only be required to drive a 3.5 tonne van. here may be a preliminary issue, therefore, as to whether the disability discrimination claim has a "reasonable prospect of success" and that would require a preliminary
15 hearing to be held which would involve additional costs.

61. Also, the respondent has not conceded that the claimant was disabled in terms of the 2010 Act and, as I record below, that in my view remains a significant issue in this case. This means that were I to allow the amendment,
20 this issue would require to be addressed in the first instance and the respondent's solicitor has intimated that he would request a preliminary hearing. That would also involve additional costs which are unlikely to be recovered by the respondent.

25 62. While I appreciate that were I to refuse the application to amend, the claim would require to be dismissed, I am of the view that the balance of prejudice favours the respondent.

63. For all these reasons, therefore, I have decided to refuse the claimant's
30 application to amend. In my view, considering all the factors in the round, it is not in the interest of justice to do so.

64. Accordingly, as the Tribunal does not have jurisdiction to consider the unfair dismissal claim, the claim is dismissed.

Disability status

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65. Notwithstanding the understanding of the respondent's solicitor, it had, in fact, been my intention to also endeavour to determine this issue "on the papers", but that is no longer necessary as I have decided to dismiss the claim.

10 66. However, as this has some relevance to my decision to refuse the application to amend, I wish to record my views.

67. In short, there would appear to be some force in the submissions by the respondent's solicitor that the claimant was not disabled in terms of s.6 of the
15 2010 Act.

68. The impairment now relied upon by the claimant is gout, but apparently there was no confirmed diagnosis of this until April 2020 several months after the claimant was dismissed. Nor is there any reference to gout in the claim form.
20 There is only reference to a "*foot injury*" and, as I understand it, the claimant believed at the time that this was due to an accident which had occurred at work.

69. The focus of the definition in s.6 is the ability to carry out "day-to-day
25 activities". I note that in his e-mail of 6 April the claimant states that: *"My Gout/Arthritis has no great detrimental effect on my day to day activities".*

70. I am not persuaded, therefore, on the basis of the information before me at present, that the claimant will be able to establish that he was disabled, at the
30 relevant time, in terms of s.6 of the 2010 Act.

71. Had I allowed the amendment, further information, including probably medical evidence, would be required and it will probably be necessary to fix a preliminary hearing to consider and determine the issue. Indeed, the respondent might require to obtain their own medical opinion and they would be responsible for the cost. Inevitably, this would result in further delay and the respondent would incur additional costs which, as I have recorded above, they would be unlikely to recover, even if they are able to successfully defend the claim.

Employment Judge	**Nick Hosie**
Date of Judgement	**20 July 2020**
Date sent to parties	**21 July 2020**