EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4104119/20 & 4104158/20 (P)

Held on 29 December 2020

Employment Judge N M Hosie

Mr K Fulke	**1st Claimant** **Represented by** **Mr M Briggs,** **Solicitor**
Mr K Reid	**2nd Claimant** **Represented by** **Mr M Briggs,** **Solicitor**
Wipro Limited	**1st Respondent** **Represented by** **Ms S Reynolds,** **Solicitor**
Highland Council	**2nd Respondent** **Represented by** **Ms K Zoyrk,** **HR Business Partner**
Northgate Public Services (UK) Ltd	**3rd Respondent** **Represented by** **Mr I Abel,** **Legal Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

E.T. Z4 (WR)

The Judgment of the Tribunal is that: -

1. **the application by the claimants to add Wipro UK Ltd and Northgate Public Services (UK) Ltd as first and third respondents respectively to case no. 4104119/20 is granted;**

2. **case no. 4104158/20 is sisted; and**

3. **a preliminary hearing by telephone conference call should be fixed as soon as possible to consider further procedure.**

REASONS

Introduction

1. The history of these two cases is somewhat complicated. On 30 July 2020, the claimants' solicitor submitted a claim form on behalf of both claimants against the three respondents (Case No. 4104119/20). The claimants brought complaints of unfair dismissal, for a redundancy payment and for notice pay. However, the claim form was rejected, in so far as it related to the first respondent ("Wipro") and the third respondent ("Northgate"), as the wrong early conciliation numbers had been inserted for these two respondents. Accordingly, this claim only proceeded against the second respondent, Highland Council. That claim is defended.

2. The claimants' solicitor did not apply for a reconsideration of the decision to reject the claims against the first and third respondent. Instead, on 3 August 2020 he submitted a fresh claim form against Wipro and Northgate (Case. No. 4104158/20). However, the particulars of the claim in the paper apart were in identical terms to the previous claim form, but, rather confusingly, there was still reference to Highland Council as the second respondent.

Case management preliminary hearing

3. I conducted a preliminary hearing to consider the management of both cases on 27 October 2020. The Note which I issued following that hearing is referred to for its terms.

4. The first and third respondents submitted ET3 Response Forms in Case No. 4104158/20 in which their respective representatives both maintained that the claim was out of time. Helpfully, in the claim form at para. 15, the claimants' solicitor had intimated that he accepted that the claim form had been presented out of time and requested that the Tribunal exercise its discretion to allow the claim to be lodged late.

5. At the preliminary hearing, the first and third respondent's representatives confirmed that they were maintaining the time bar point. Accordingly, I directed the parties to make written submissions to the Tribunal on the point and advised that I would consider the point "on the papers" and issue a written Judgment with reasons in due course.

Rule 34 Application

6. However, on 27 October 2020 at 16:16, the Tribunal received an e-mail from the claimants' solicitor with an application, under Rule 34 of the Tribunal Rules of Procedure, to add the first and third respondents to the first claim (4104119/20).

7. The e-mail was received on the same day as the case management preliminary hearing but after the hearing had concluded. The claimants' solicitor did not intimate at the hearing his intention to make such an application. In any event, the application was opposed by the first and third respondent but not opposed by the second respondent, Highland Council.

8. I decided that it would be necessary to consider and determine this application in the first instance. If granted, it would not be necessary to consider the time bar point in relation to the subsequent claim (number 4104158/20) as the first claim would proceed against all three respondents. However, were I to refuse the application it would be necessary to consider and determine the time bar issue.

Claimants' Rule 34 application

9. As I recorded above, the claimants' solicitor made this application by e-mail on 27 October 2020 at 16:16. His e-mail is referred to for its terms.

10. In support of his application he referred to the following cases:-

Selkent Bus Company Ltd v. Moore [1996] IRLR 661
Cocking v. Sandhurst (Stationers) Ltd [1974] ICR 650
Drinkwater Sabey Ltd v. Burnett [1995] IRLR 238
Gillick v. BP Chemicals Ltd [1993] IRLR 437
R (on the application of Buglife) v. Thurrock Thames Gateway Development Corporation [2-8] EWCA Civ 1209
Drake International Systems Ltd & Others v. Blue Arrow Ltd [2016] ICR 445

11. In his e-mail the claimants' solicitor set out the background to his application. He accepted, insofar as the first claim (case no. 4104119/20) was concerned, that: "*there was an error in transcribing the EC Certificate numbers on to the claim form in respect of both the first respondent, Wipro, and the third respondent, Northgate.*" The claimants' solicitor was instructed by the claimants at that time and he prepared the claim form.

"Determination of R.34 Applications"

12. The claimants' solicitor referred to the process to be followed as set down in ***Cocking***. He submitted that these guidelines required to read in conjunction with the guidance from the EAT in ***Selkent***.

13. He further submitted, with reference to ***Selkent, Drinkwater and Gillick***, that: "*The decision whether or not to add in parties is not a question of jurisdiction. This Tribunal would fall into error if it was to make any determination solely on the basis of whether or not it would have been reasonably practicable for the claim to have been submitted correctly against the two prospective respondents within the original deadline.*"

14. He also made "two additional points". The first was that: -

"*Had the original claim form been submitted today (27 October 2020) the claims against the two prospective respondents would have been accepted by the Tribunal. The Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) 2020 were laid before Parliament in September of this year and have now insofar as they are relevant to this application come into force) passed into law.*

The reason this amendment was made was that Parliament recognised that the automatic rejection of a claim on the basis the one typographical error in just one part of the claim was arbitrary, draconic, unfair and had led to a number of unnecessary appeals and preliminary hearings. There was no good reason why a typographical error in one part of a claim form would render the entire claim invalid whereas numerous typographical errors in other parts of the form would not."

15. The second additional point related to the contention by the respondents' representatives that the claimants would have a potential remedy against their advisers in the event that the second claim (Case no.4104158/20) was not accepted out of time. He submitted that:-

"*In the Employment Tribunal, as in all legal forums in Scotland, there is strong and overriding interest against the creation of satellite litigation. The Court of Appeal has said that '**Courts should do their utmost**' to discourage satellite litigation (**R (on the application of Buglife)**. This particular issue of satellite litigation in relation to the application of the Early Conciliation rules and strongly cautioned against by Langstaff J in **Drake**.*

*While the Tribunal finding want of jurisdiction against the two prospective parties **may** entitle the claimants some form of remedy against their advisors, there will remain a claim in time against the respondent in the 4104119/2020* (sic)*. This creates a very serious risk of effectively the same substantive case being run in two separate courts concurrently. Such is the risk of injustice (along with additional, unnecessary expense being borne by the public) that the Tribunal should factor this into its consideration when determining the issue.*"

16. The claimants' solicitor then went on in his e-mail application to make the following submissions:-

"*Applying the **Cocking** principles to the current case:*

1. *A valid claim form was presented to the Employment Tribunal in respect of the current claim.*
2. *That claim was submitted within the original time frame.*
3. *The defect was caused by a genuine error in transcription (there appears to be no sensible basis upon which to suggest otherwise).*

It is therefore submitted that the Tribunal should use its discretion to add the two prospective respondents to this litigation. The error in transcription has caused no prejudice to the respondents whatsoever. The respondents received claim forms in identical terms within a matter of days. The respondents' ET3 to this case is currently outstanding, therefore it is submitted that no progress has been missed and no delay to proceedings has been caused by application being made at this date.

The error itself which led to the rejection was minor. The consequence of the error is that the Claimants may be left without remedy in the event that the Tribunal decides that they did not transfer to the respondent and instead was dismissed by one of the two prospective respondents.

In determining whether or not to exercise its discretion, I would ask the Tribunal to have regard to the fact that, since the date of lodging, Parliament has acted to avoid future claims from being able to proceed on this basis. The distinction between the present claim and many of the claims in respect of which appeals have been brought, is that this claim was accepted in respect of a respondent. In consequence, unlike the claims which were rejected in their entirety, the Tribunal is not required to determine this issue on a jurisdictional basis (indeed, it would be in error were it to do so).

In all the circumstances, granting this order would be wholly in furtherance of the overriding objective. The interests of neither fairness nor justice are served by allowing prospective respondents to evade any form of legal challenge purely on the basis of two typographical errors, particularly when the rules which led to such a draconic application of the law have since been identified and made more flexible by Parliament."

Second respondent's response

17. The representative for the second respondent, Highland Council, intimated by e-mail on 11 November 2020 at 10:03 that she did not object to the claimants' application under Rule 34.

Third respondent's response

18. The representative of the third respondent, Northgate, intimated by e-mail on 3 November 2020 at 11:58 that he objected to the claimants' application under Rule 34. He said this:-

"Firstly, we believe that the Tribunal should continue with the outcome of the preliminary hearing on 27 October 2020. Due to the way the Tribunal ordered, this appears to be nothing more than the Claimants' representative attempting to have "second bite at the cherry" considering the directions laid down as to how the Tribunal is able to deal with this matter by written representations, despite the protestations of the Claimants' representative. Clearly dealing with the matter in this way would be in line with the overriding objective and ultimately save the valuable time and resources of the Tribunal.

Further, the argument below could have easily been raised by the Claimants' representative at the time of the preliminary hearing, to allow the Employment Tribunal Judge to deal with it at the time. We strongly disagree therefore with the Claimants' representative's assertion that their application would save time and resources for the Tribunal. This is simply not correct and the factual reality is the complete opposite – this application (which could have been made at the time of the preliminary hearing and we would have expected a reputable firm of solicitors to have accordingly done so) is already requiring further resources from the Tribunal. So, we strongly disagree the granting of this application will save time and avoid delay as the Claimants' representative states. In fact, if granted the application will undoubtedly mean a far longer time hearing is necessary for the Tribunal and with three Respondents as opposed to one, together with the additional administrative work for the Tribunal that comes with a case with three Respondents.

At the Preliminary Hearing the Claimants' representative admitted the error was on their part in terms of a typo, which ultimately it meant a limitation date was missed. We use our language carefully at this point, but believe most in the legal profession would agree that missing a limitation date amounts to negligence on the part of the instructed solicitor. At this point we should also

highlight the Claimants' representatives themselves. This is a nationally reputable law firm, and one well known for dealing with trade union cases. As we believe it, they were instructed throughout this matter, yet only choose to submit the Claimants' claim one day before the limitation date. We would respectfully suggest that firstly a professional firm should not make such a typographical administrative error in any event, with the appropriate mitigation in place to avoid such serious errors, but fully appreciate mistakes happen. This is a reason law firms are required to have indemnity insurance in place to help when these such mistakes occur. However, unless they can prove otherwise, we believe there would have been no reason why the Claimants' representative could not have submitted their claim earlier than the date submitted, and in which case had the typos then been found and the claim rejected, the Claimants' representatives would still have enough time to resubmit within the original time limitation date.

Whilst we understand and appreciate the claimants' points re the Scottish judicial system's intent to avoid satellite litigation, we would however respectfully put forward the intent of Parliament regarding the same was not to let potentially negligent parties "off the hook" in favour of continuing litigation against a party that has a genuine legal argument as to why the claim against them should be dismissed on the basis of jurisdiction.

Finally, we note the Claimants' representative appears to ask the Tribunal to look favourably upon this application due to the fact that the issue of errors with EC Certificates has been dealt with the revised The Employment Tribunal (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020. We would respectfully point out these Regulations only came into force on the 8 October 2020, whereas the Claimants' claim in question was initially submitted 30 July and then finally again on 3 August 2020, clearly before the effective date of the legislation referred to. Clearly it would be the incorrect approach in law to retrospectively apply a set of legislation prior to becoming effective in law."

Claimants' response

19. Later that day, 3 November 2020, at 13:39, the claimants' solicitor responded to the e-mail from the third respondent's representative. He maintained, with reference to ***Beresford v. Sovereign House Estates & Another*** [2012] ICR (D9), that the third respondent is, *"not a party to this litigation and therefore has no locus to object to this application."*

20. He submitted that the third respondent was only a party to the subsequent claim (Case No. 4104158/20) and had only been copied into the application *"out of courtesy".*

21. For the avoidance of doubt, he advised that the application related to the first claim (Case No. 4104119/20), in which the second respondent, Highland Council, is the only respondent.

Third respondent's further response

22. The third respondent's representative responded by e-mail on 11 November at 10:33 as follows:-

"*We would point out, as the Claimants' representatives have done, the case law they provided pre-dates the current Employment Tribunal rules. As far as we interpret Rule 34, this allows the Claimants (or Tribunal for that matter) to add or remove an additional party but does not preclude that party from making objections to the application. Rule 34 contains the wording: "in the interests of justice" and we would respectfully submit that allowing the respondent to an application under Rule 34 is in accordance with this and the overriding objective in any event* (sic).

We maintain a better conclusion would to (sic) *continue with the case as per the Tribunal's discretion from the Preliminary Hearing on the 27th October 2020. It may be that the Tribunal wishes to consider the outcome of that case, and the written representations to be provided by the parties shortly before making a decision on the Claimants' application below, but we shall let the Tribunal decide how they wish to proceed. We strongly believe this would save the Tribunal valuable time and resources and is again in line with the overriding objective.*"

First respondent's objections

23. The solicitor for the first respondent, Wipro, intimated her objection to the claimants' Rule 34 application by e-mail on 12 November 2020 at 07:58. The following are excerpts:-

"*Whilst it is accepted that both the First and Second Claims arise from the same set of facts, it was Thompsons' decision to present the claim separately as they did, for consideration separately by the Tribunal. It is not disputed that the Second Claim is out of time. The Tribunal has ordered all parties to make*

representations relating to the time bar point separately; whether or not the Second Claim is permitted to proceed thereafter should have no bearing on the outcome of this application. What is relevant to this application however, is the existence of the Second Claim per se, a claim which Thompsons have confirmed in their e-mail is "in identical terms" to the First Claim. Given the existence of the identical Second Claim there should be no need to add the same Respondents to that Second Claim as Respondents to First Claim. Nor would it serve any useful legal purpose to do so, and would only likely cause confusion all round. It cannot be right that the Tribunal is being asked to add Respondents to a claim where the exact same claim against those Respondents already exist. But for the time bar issue with the Second Claim, Thompsons would not be requesting that our client or Northgate are added as Respondents to the First Claim. It is in our view, precisely as Mr Abel (the 3rd respondents' representative) put it in his objection e-mail, a case of Thompsons 'attempting to have second bite at the cherry'.

Thompsons have suggested that the Claimants will have no remedy if our client and Northgate are not added as Respondents to the First Claim and it is found that the Claimants did not transfer under TUPE to the Respondent to that Claim, i.e. The Highland Council. That is emphatically incorrect. Both our client and Northgate are already parties to an identical claim, i.e. the Second Claim. The Claimants therefore have a potential remedy under the Second Claim. If the time bar point were not an issue, Thompsons would not be making this argument, as the Claimants would then have in-time claims against our client and Northgate covering the same subject matter. As Northgate's representative has already pointed out, it follows that if the Second Claim is judged to be out of time and is not permitted to proceed (due to Thompsons' failure to lodge the Second Claim in time) the Claimants' remedy lies squarely against the lawyers preparing that Claim i.e. Thompsons. All law firms are required to have indemnity insurance precisely to provide their clients with a remedy in the event of negligence on the part of the firm."

24. The First Respondents' solicitor then made submissions regarding the submission of the "First Claim", but these were predicated on a misunderstanding of the position. It is not necessary, therefore, for me to rehearse them here.

25. Finally, the First Respondent's solicitor made the following submissions:-

"*Thompsons have suggested that as neither our client nor Northgate are parties to the First Claim at this time, neither has* ***locus standi*** *to be able to advance any objection to the Application. As Rule 30(2) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("ET Rules") provides, where a written application is made, the party making the Application "shall notify the other parties that any objections to the Application*

should be sent to Tribunal as soon as possible". The wording of this rule does not stipulate that "the parties" in question need to be a party to the claim. Rather, a more logical and simple interpretation of the wording in this rule is that "the parties" are those concerned with or affected by the application. This would clearly include a party whom the applicant was seeking to add to add to a claim, particularly when in doing so, as here, the claims against that party would be out of time, the applicant had full opportunity to add those parties when it first presented the claim but deliberately chose not to do so, and the applicant had already brought separate proceedings against those parties concerning the same subject matter. It appears that Thompsons themselves initially interpreted Rule 30(2) ET Rules in this way when they first made their application, stating at the time "I confirm that both the Respondents and the prospective respondents' representatives have been copied into this e-mail and remind them, should they have any objections to this request, they should make them to the Tribunal as soon as reasonably practicable." It is clearly in the interests of justice under Rule 34 ET Rules that parties potentially affected by an application are able to advance representations for consideration. This also enables a case to be dealt with fairly and justly in line with the overriding objective in accordance with Rule 2 of the ET Rules.

For all the reasons advanced, we confirm our objection to the Application. We confirm that we have copied all parties into this correspondence and look forward to hearing from the Tribunal in due course."

Discussion and decision

26. I was satisfied that the prospective first and third respondents had a right to object in accordance with the "overriding objective" in the Rules of Procedure and the interests of justice.

27. Having regard also to the "overriding objective" and the "interests of justice", I decided to deal with the Rule 34 application first.

28. Rule 34, in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure"), is in the following terms:-

"***34. Addition, substitution and removal of parties***

The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way

of substitution or otherwise, if it appears there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included."

29. There is, therefore, a wide discretion under Rule 34 to add, substitute and remove parties to proceedings. This power, when read, in conjunction with Rule 29, can be exercised, "*at any stage of the proceedings*", which can be even after the time limit for bringing a fresh claim against the respondent has expired.

30. The same principles apply to an amendment to add, substitute or remove parties to a claim as to any other sort of amendment.

31. In ***Cocking***, 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***. 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 relevant hardship that will be caused to parties by granting or refusing the amendment. Mummery LJ said this at pages 843 and 844:-

"*……..*

(4) Whenever the discretion to grant the 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) 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.

Applications to amend are of 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 substituting of other labels for facts already pleaded to, to on the other hand, the making of entirely new 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 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 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 or information appearing from documents disclosed on discovery. Whenever taking factors into account the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. The questions of delay, as a result of adjournment and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

Present case

"Nature of the amendment"

32. It was significant that the two respondents who the claimants' solicitor wished to were parties to the first claim (case no. 4104119/20). While the claim was rejected against the first and third respondents they had been engaged in early conciliation and certificates had been issued for them. Also, the particulars of the claim were in identical terms to the subsequent claim (Case No. 4104158/20).

"Applicability of time limits"

33. The application to add the first and second respondents was made by the claimants' solicitor on 27 October 2020 which was outwith the three-month time limit which, the claimants' solicitor accepted, as extended by early conciliation, expired on 1 August 2020. However, the case law makes it clear that this is but one factor to be weighed in the balance and, of course, the Tribunal has a discretion to allow an amendment.

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

34. While the application was out of time it was maintained by the claimants' solicitor that he was not made aware that the first claim had been rejected against the first and third respondents until 3 August 2020. There was nothing to suggest that that was not so. The second claim form was submitted on that date and duly intimated to the first and third respondents who have now submitted response forms.

35. While the Rule 34 application could have been made earlier by the claimants' solicitor, the principal issue is, *"the relative injustice and hardship involved in refusing or granting the amendment",* as Mummery LJ said in ***Selkent***.

36. Were I to refuse the amendment, the claimants may be deprived of pursuing a successful claim against either the first or third respondents. In that event, they may have a remedy against their solicitors whom but that is likely to be a lengthy, involved and expensive process.

37. On the other hand, were I to grant the application I am satisfied that the delay in making the application would not affect the cogency of the evidence. I am also satisfied that the first and third respondents will not be prejudiced in responding to the first claim form, as amended, as the second claim form was

intimated to them by the Tribunal on 6 August 2020 and the particulars of the claim are in identical terms.

38. I decided, therefore, that the balance of hardship/injustice favours the claimant.

39. I arrived at the view, therefore, that the application should be granted. I was satisfied that this was in accordance with the "overriding objective" in the Rules of Procedure. I was satisfied that, by and large, the submissions by the claimants' solicitor were well-founded (apart from his contention that the first and third respondents had *"no locus to object"*).

40. In arriving at this view, I was also mindful of the reason why the first claim form had been rejected. It was because of a minor typographical error. An error, which if made now, would not have resulted in the claims being rejected due to an amendment to the Rules of Procedure. I am satisfied, therefore, that in all the circumstances, it is also in the interests of justice to grant the application.

Further procedure

41. Having made this decision, the first claim (Case No. 4104119/20) will proceed against all three respondents, as originally framed, and it is no longer necessary for me to consider and determine the issue of time-bar in the second claim (Case No 4104158/20) which can be sisted which will avoid any issue of *res judicata* arising.

42. With a view to saving expense and having regard to the overriding objective I direct that it will not be necessary for the first and third respondents to submit ET3 Response Forms in the first claim. As the particulars of claim are in identical terms, the ET3 Response Forms which they have already submitted

in response to the second claim will be taken to be responses to the first claim.

Case management preliminary hearing

43. There is clearly an issue now as to whether the TUPE provisions apply. **I direct that a case management preliminary hearing be fixed, by telephone conference call, as soon as possible, to consider the following issues: -**

1. **How best to consider and determine the TUPE issue.**
2. **Whether that could be done by way of written submissions or whether a hearing "in-person" or remotely by Video Conference will be required.**
3. **Possible preparation of a Joint Statement of Agreed Facts.**
4. **Orders and Directions.**
5. **Any other relevant matters.**

Employment Judge N M Hosie

Dated: 2nd February 2021

Date sent to parties: 2nd February 2021