



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4122847/2018**

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**Held in Glasgow on 10 September 2019**

**Employment Judge M Sangster**

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**Mrs J Downs**

**Claimant**

**Glasgow Kelvin College**

**Respondent**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The judgment of the Tribunal is that the claimant's application to amend her claim is refused.

### **REASONS**

#### **Introduction**

25 1. On 16 November 2018, Thompsons Solicitors, who were instructed on behalf of the claimant, lodged an ET1 with the Employment Tribunal. In the ET1, the claimant raised claims under sections 146(1) and 168(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA**). The ET1 clearly articulated these claims by reference to the relevant provisions of the  
30 legislation. No other claims are referred to and, at section 8.1 the relevant boxes are not ticked to indicate that the claimant is bringing a claim of discrimination, whether on the grounds of sex, disability or otherwise.

**E.T. Z4 (WR)**

2. A case management preliminary hearing took place on 1 February 2019. At that hearing, the claimant was again represented by Thompsons Solicitors. It was noted that the only claims raised were those under sections 146 (detriment) and 168 (time off for trade union activities) of TULRCA. It was  
5 agreed that some further specification of the claims raised would be provided by the claimant and that the case would be set down for a 4 day final hearing.
3. A final hearing was thereafter set for 10-13 September 2019 inclusive.
4. On 9 August 2019, the claimant sought to amend her claim to include the following claims:
  - 10 (i) Under the Public Interest Disclosure Act 1998 – victimisation for making disclosures to the respondent in relation to health and safety concerns; and
  - (ii) Under the Equality Act 2010 for direct discrimination on the grounds of sex – being treated less favourably than the previous lead steward,  
15 who was male, in relation to trade union facility time.
5. On 22 August 2019 the respondent objected to the application to amend the claim.
6. The final hearing set for 10-13 September 2019 was discharged and a preliminary hearing set for 10 September 2019, to determine the application  
20 and set further procedure. Agendas were sent to the parties for completion. Within the claimant's agenda form she indicated that she wished to bring further, additional claims as follows:
  - 25 (i) Direct discrimination on the grounds of sex – being treated less favourably than male comparators in the exercise of functions as a health and safety representative;
  - (ii) Indirect discrimination on the grounds of sex – in relation to facility time;
  - (iii) Harassment on the grounds of sex – in relation to the refusal of requests for facility time;

(iv) Discrimination arising from a disability – in relation to a requirement to complete a stress risk assessment; and

(v) Failure to make reasonable adjustments – in relation to the process for completion of the stress risk assessment.

5 7. The respondent also completed an agenda, opposing the initial and additional applications to amend the claim.

8. The claimant confirmed at the outset of the preliminary hearing that she wished all the items in her application dated 9 August 2019, and those specified in her agenda, to be considered as amendments to her claim.

10 9. During the course of the preliminary hearing, the claimant sought to introduce additional documents, one of which referred to a meeting which she had with a partner at Thompsons, Peter O'Donnell. It was noted by the respondent's representative that Mr O'Donnell is also an Employment Judge, who sits on a part time basis in Scotland. I confirmed that this was the case. I confirmed to  
15 both parties that that would not impact my decision in any way: I would consider matters solely on the evidence presented to me and the relevant legal tests. I also assured parties that the matter would not be discussed with Mr O'Donnell.

### Findings in fact

10. The Tribunal found the following facts, relevant to the issues to be determined,  
20 to be admitted or proved.

11. The claimant is employed by the respondent as an Administration Officer. She is also a trade union representative for Unison and a health and safety officer for the respondent.

12. On 6 June 2018 she commenced a period of sickness absence due to work  
25 related stress. During her absence, on 2 July 2018, she was diagnosed with breast cancer. She had a mastectomy on 15 August 2018. She has not yet returned to work.

13. On 4 September 2018 the claimant commenced early conciliation in relation to her claim.

14. On 17 September 2018, the claimant completed a Unison case form seeking legal assistance and representation for an Employment Tribunal claim. The form states '*Most claims to the Employment Tribunal have to be lodged within 3 months less one day of the act, failure to act or incident (e.g. discrimination, unfair dismissal etc.)*'. Section 19 of the form asks if there is a legal claim and provides boxes to be ticked if so, namely: breach of contract, unlawful deduction from wages, holiday pay, unfair dismissal, discrimination, maternity/pregnancy, trade union detriment and protective award. There is then a section to be completed which states '*Any other (please state)*', with space for additional details to be completed. If discrimination is ticked, there is a further section requiring the individual completing the form to specify the protected characteristic relied upon. The claimant ticked the box to confirm there was a legal claim. She then ticked only the box '*Trade union detriment*'. She did not complete any details in the section '*Any other (please state)*', did not tick the discrimination box and did not tick any boxes next to any of the protected characteristics. When asked to provide the date of the incident (or most recent incident) which is the subject of the case, she stated 6 June 2019. When asked if she had a disability, she ticked the box '*No*'.
15. In the section requiring the claimant to provide details of her claim, the claimant listed 5 bullet points, the first of which stated, '*Please see email to Branch Officials of 12/09/18, 15.28*'.
16. The email to Branch Officials of 12/09/18, 15.28 stated as follows
- 'Essentially my case summary is as follows:*
- I believe I was subjected to detriment by my employer, Glasgow Kelvin College, over an extended period, by their actions and failure to action, because I was a Health and Safety trade union representative conducting my function in this role on behalf of UNISON members and people who entered the premises, on matters of health and safety at work.*
- I brought to my employer's attention, issues and concerns I either observed through Work Place Inspections for example or that were brought to me by people in the buildings whilst conducting my role as a trade union Health and*

*Safety Representative, matters that I believed were reasonable harmful or potentially harmful to health and safety. This could also be described as whistleblowing– Public Interest Disclosure, made in the public interest.’*

17. As a footnote to the email the claimant stated ‘Sources: section 44,  
5 *Employment Rights Act 1996; Public Interest Disclosure Act 1998 (PIDA); UNISON – Victimisation on Union Grounds; Acas’*
18. The claimant was admitted to hospital from 22-26 September and 2-5 October 2018 due to complications following her surgery.
19. The claimant met with Thompsons to discuss her claim on 1 November 2018.  
10 She had collated a file of relevant evidence, which was provided to Thompsons in advance of the meeting. She did not suggest during her meeting with Thompsons that she felt that she had been discriminated against on the grounds of sex or disability. Rather she focused on detrimental treatment as a result of being a trade union representative.
- 15 20. Prior to submitting the ET1, a draft was sent to the claimant for review and approval. The claimant reviewed this and made some minor amendments, but the draft provided closely resembled the final version lodged with the Tribunal.
21. The ET1 was lodged with the Tribunal on 16 November 2018.
22. The claimant attended for an occupational health appointment on 8 January  
20 2019. The Occupational Physician reported that the claimant had developed depression as a result of her diagnosis and continued to experience significant depressive symptoms – she had been prescribed antidepressants and was seeing a specific psychologist from the breast clinic. She also reported significant sleep deprivation, reduced concentration and emotional lability.
- 25 23. The claimant attended a further meeting with Thompsons on 16 January 2019. At that meeting, she was provided with a copy of the final ET1 which had been submitted. She was aware when attending that meeting that a case management preliminary hearing was due to take place on 1 February 2019.

24. Thompsons represented the claimant at the case management preliminary hearing. She did not attend. At the preliminary hearing the claimant was ordered to provide further specification of her claims. A draft of that further specification was prepared and sent to the claimant for review, which she did.  
5 The final version was then submitted to the Tribunal on 25 February 2019.
25. On 9 May 2019 the claimant met with Thompsons. A number of individuals were present, including Peter O'Donnell. The claimant had not met Mr O'Donnell before. She requested that Thompsons apply to amend her claim to include a claim under the Public Interest Disclosure Act. They declined to do  
10 so.
26. On 4 June 2019, Thompsons intimated to the Tribunal and the claimant that they were withdrawing from acting on her behalf.
27. The claimant had further surgery on 21 June 2016 and was discharged from hospital the following day.
- 15 28. On 9 August 2019, she sought to amend her claim.

### Respondent's submissions

29. The respondent referred to the principles set down in **Selkent** and stated that that case sets down some examples of things to be considered, but ultimately the relevant test was the balance of prejudice. The respondent addressed  
20 each category of claims which the claimant sought to introduce (PIDA, sex discrimination and disability discrimination) in turn, by reference to the **Selkent** principles, stating as follows:
- (i) The nature of the amendment – the claims were new factual claims, which were not sufficiently particularised: there was no document  
25 setting out the precise terms of the amendment which the claimant sought to make and there was insufficient specification of the proposed new claims.
  - (ii) The applicability of time limits – the claims are considerably out of time. The application comes over 13 months after the last act

complained of in June 2018. Whilst it was noted that the Tribunal had discretion for discrimination claims, where it was just and equitable to extend time, PIDA claims would only be accepted late where it was not reasonably practicable to lodge within three months and the claim was brought in a reasonable period thereafter.

(iii) The timing and manner of the application – it was made 9 months after the ET1 was lodged and just one month prior to the final hearing. The claimant was professionally represented from November 2018 to June 2019. No explanation has been advanced as to why these claims were not raised previously, given that the claimant was professionally represented.

30. The cases of **Chief Constable of Essex Police v Kovacevic** UAEAT/0126/13/RN and **British Gas Services Limited v Basra** UAEAT/0194/14/DM were referred to.

31. If the amendment is allowed the respondent will require to seek further and better particulars of the additional claims, will require to make new enquiries to compile a response and defend the claim. It is likely that a further preliminary hearing will be required and that the final hearing would be much longer. There will be additional time spent, cost and delay. There would be some prejudice to the claimant if the amendment was not allowed, but she would not be left without a claim. The prejudice to the respondent would be greater, given the above.

### **Claimant's submissions**

32. The claimant submitted that she had not been in a position to engage with her claim given her medical condition. She stated that the facts of the claims she is now seeking to bring were contained in the original claim form, she is simply seeking to clarify the basis of claim. It is in the interests of justice that all facts and circumstances are examined by the Tribunal. The balance of justice and fairness weighs in her favour, as a litigant in person. There will be significant hardship to her if the application to amend is refused, as she will be denied the right to a fair hearing.

## Relevant law

33. Employment Tribunals have a broad discretion to allow amendments at any stage of proceedings, either on the Tribunal's own initiative or on the application by a party. Such a discretion must be exercised in accordance with the overriding objective (which is set out in the Employment Tribunals Rules of Procedure) of dealing with cases fairly and justly. Although various principles apply specifically to the assessment of an application to amend, the need to comply with the overriding objective underlies the application of those principles.
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- 10 34. In ***Selkent Bus Company Limited v Moore*** 1996 ICR 836 guidance was given as to how Tribunals should approach applications to amend. The EAT confirmed that any application to amend a claim must be considered in light of the actual proposed amendment, so that the Tribunal may understand and give consideration to the purpose and effect of the amendment. It is important therefore that the application sets out the terms of the proposed amendment in the same degree of detail as would be expected had it formed part of the original claim, that is to say, such as to give fair notice to the other party of the case which it is to meet.
- 15
- 20 35. In approaching the question of whether to allow an application to amend, Tribunals must have regard to all the relevant circumstances and in particular to any injustice or hardship which would result from the amendment or a refusal to allow it (***Cocking v Sandhurst (Stationers) Limited and another*** 1974 ICR 650, NIRC).
- 25 36. Accordingly, when determining whether to grant an application to amend Tribunals should carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the levels of hardship that would be caused to the parties by granting or refusing the amendment. In ***Selkent*** the then President of the EAT Mummery P explained that relevant factors would include:-
- 30 (i) **Nature of the amendment** - i.e. is the amendment, for example, one involving the correction of clerical or typographical errors, the addition



of factual details to existing allegations and or the addition or substitution of other labels for facts already pled? Alternatively, is the amendment one which involves the making of entirely new factual allegations that change the basis of the existing claim? In other words, whether the amendment sought is a minor matter, or a substantial alteration pleading a new cause of action.

(ii) **Applicability of time limits** – if a new claim or cause of action is proposed to be added by way of amendment, the Tribunal should consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended.

(iii) **Timing and manner of the application** – an application should not be refused simply because there has been delay in making it, as amendments may be made at any stage of the proceedings. 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 identification of new facts or new information from documents disclosed on discovery.

37. The above is not an exhaustive list. There may be additional factors to consider in any particular case, but the above basic factors should form part of the Tribunal's consideration.

38. The hardship and injustice test is a balancing exercise. As noted by the Lady Smith in *Trimble and another v North Lanarkshire Council and another* EATS0048/12 it is inevitable that each party will point to there being a downside for them if the proposed amendment is allowed or not allowed. It will therefore rarely be enough to look at the downsides or 'prejudices' themselves. These need to be put in context, and that is why it is important to look at all the surrounding circumstances.

### Decision

39. In considering the application to amend, the Tribunal considered each of the factors set out in Selkent and reached the following conclusions.

*Nature of the amendment*

40. The claim originally lodged with the Tribunal solely related to claims under sections 146 and 168 of TULRCA. The claim form clearly articulated these claims by reference to the relevant provisions of the legislation. No other  
5 claims are referred to and, at section 8.1 the relevant boxes are not ticked to indicate that the claimant is bringing a claim of discrimination, whether on the grounds of sex, disability or otherwise. The claim form was completed by solicitors instructed by the claimant. At the case management preliminary hearing on 1 February 2019, the claimant's solicitor confirmed that these were  
10 the only claims being advanced and a note was prepared following the preliminary hearing confirming this.

41. The claims which the claimant seeks to introduce by way of amendment are new claims of discrimination on the grounds of sex and disability, as well as a claim under the Public Interest Disclosure Act 1998. The amendment  
15 accordingly seeks to substantially change the basis of the existing claim, pleading entirely new causes of action.

*Applicability of time limits*

42. Each of the proposed new claims are brought substantially outwith the normal time limits for raising those claims. The amendment seeks to introduce new  
20 causes of action in relation to events which occurred, at the latest, in June 2018, well over a year before the application to amend was made.

43. Claims under the Public Interest Disclosure Act 1998 should be brought within 3 months of the date of the act complained of or, where this is not reasonably practicable, within such further period as the Tribunal considers reasonable.

25 44. The Tribunal concluded that it was reasonably practicable for a claim under the Public Interest Disclosure Act 1998 to have been submitted timeously. An ET1 was lodged, on the claimant's behalf, with the Tribunal on 16 November 2018. That ET1 could have included a claim under the Public Interest Disclosure Act 1998.

45. Claims of discrimination on the grounds of sex or on the grounds of disability should also be brought within 3 months of the date of the act to which the complaint relates (or the last of any such actions, where they are part of conduct extending over a period). Tribunals have discretion to extend that time limit by such period as they consider just and equitable. Given the factors set out below, under 'timing and manner of the application', the Tribunal did not consider that it would be appropriate to exercise discretion to extend the time limit.

*Timing and manner of the application*

46. The Tribunal noted that the application was made very late in the proceedings (a month before the final hearing was due to commence) and that it had already caused the final hearing to be postponed.

47. The Tribunal considered why the application was being made at this stage. The claimant indicated that she was not in a position to control the direction of her claim prior to her application to amend, due to her ill health. Whilst the Tribunal accepted that the claimant had been unwell, the Tribunal did not accept that the claimant had been unable to control the direction of her claim as a result of that illness. In reaching this conclusion the Tribunal noted that:

(i) The claimant is an experienced trade union representative, with a knowledge and understanding of employment law;

(ii) The claimant initiated the early conciliation process herself, on 4 September 2018;

(iii) On 12 September 2018 the claimant wrote an email to Branch Officials summarising her claim and including specific reference to relevant legislative sources;

(iv) On 17 September 2018 the claimant completed the Unison case form;

(v) The claimant thereafter compiled a file of relevant evidence which she forwarded to Thompsons in advance of meeting with them;

(vi) The claimant met with Thompsons on 1 November 2018 to discuss her claim;

(vii) The claimant was then professionally represented by Thompsons from November 2018 to June 2019. She accepted that, during that period she:

a) reviewed and revised the draft ET1, before it was submitted;

b) attended a further meeting with Thompsons on 16 January 2019;

c) reviewed and revised the further specification of her claim, which was drafted by Thompsons following the preliminary hearing on 1 February 2019; and

d) attended a further meeting with Thompsons on 9 May 2019.

48. Taking into account the above factors, and considering the balance of hardship and injustice between the parties, the Tribunal concluded that the application to amend the claim should be refused in its entirety. The prejudice that would be caused to the respondent by allowing the amendment (additional time, cost and delay) outweighed that which would be caused to the claimant by refusing it – she would still have a potential right of redress, as her claim under TULCRA would proceed to a final hearing.

49. For the above reasons, the claimant's applications to amend her claim are refused.

**M Sangster**  
**Employment Judge**

**23 September 2019**  
**Date of Judgment**

**Date sent to parties**

**27 September 2019**