EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case No: 4107351/2019**

Preliminary Hearing Held remotely on 25 February 2021 (A)

Employment Judge A Kemp

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Mr D McGhee	**Claimant** **Represented by** **Mr C Howie** **Solicitor**
Aberdeen City Council	**Respondent** **Represented by** **Mr C Donald** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 **The claimant's application to amend his Claim is refused.**

REASONS

Introduction

30 1. This Preliminary Hearing was arranged to consider an application for amendment by the claimant made by email on 23 December 2020 by his new solicitor Mr Howie, who had been instructed in November 2020. The claimant had been represented by another solicitor when presenting his Claim Form. It was a claim for constructive unfair dismissal under sections
35 95 and 98 of the Employment Rights Act 1996. The amendment sought to add claims for disability discrimination under sections 15 and 21 of the

Equality Act 2010. The amendment was opposed by the respondent by letter dated 13 January 2021 from its solicitor Mr Donald.

Context

2. The application to amend is to be considered in the context of the existing pleadings, and although no facts were established it is understood that the essential details are not disputed.

3. The claimant was employed by the respondent as a teacher. He was subject to various periods of suspension from duty from the time of a set of allegations against him in 2010, and subsequently. In due course some of the allegations came to the attention of the General Teaching Council for Scotland, which commenced a fitness to practice process. On 18 January 2019 the claimant consented to his removal from the register of teachers by signing a Removal with Consent Order (RCO). The RCO meant that the claimant could not be employed by the respondent as a teacher. The claimant resigned with effect from either 18 or 21 February 2019, the date not being agreed by the parties but the precise date not being material for present purposes. In doing so he did not give notice, and claimed that his decision was the result of repudiatory breaches of contract by the respondent for the period from 2010 to the date of his resignation. He commenced early conciliation on 3 May 2019, the certificate for that was issued on 25 May 2019, and the Claim Form presented to the Tribunal on 12 June 2019. It contained only a claim of constructive dismissal.

Claimant's submission

4. The following is a basic summary of the submission made. Mr Howie accepted that the application to amend was to add a new cause of action, and that doing so was outwith the primary period of three months, which is provided for under section 123 of the Equality Act 2010. He argued that it was just and equitable to allow it, and that the balance of hardship favoured the claimant. He argued that the claim was based on much the same facts, and that the claims under the 2010 Act were not raised by his then solicitor. At that time the claimant was on medication for depression

and anxiety, as well as having mental health issues which affected his cognitive abilities. Had the claims set out in the amendment been within the ET1 they would have been in time. The claimant faced what he said were substantial evidential hurdles in the claim as pled, which did not apply to the claims in the amendment, and the latter did not have the statutory limit on compensation in circumstances where the claimant suffered career loss. It was in accordance with the overriding objective to allow the amendment. No authority was cited.

Respondent's submission

5. The following is a basic summary of the submission made. Mr Donald argued that the claim was over 19 months out of time, and that there had been material delay in its pursuit. He argued that there would be substantial hardship caused to the respondent by the delay. The Head Teacher referred to in the amendment, Mr Innes, had retired. Evidence would be more difficult to obtain. Although it was accepted that the claimant was likely to be a disabled person under the 2010 Act, the issue of what the respondent knew, or ought reasonably to have known, and when would require to be determined. That involved Mr Innes, and events said to have happened going back to 2016. The amendment would add a further layer of complexity and delay. The claimant may have an alternative remedy against his former solicitor. The claimant had in any event delayed in pursuing the amendment. Although the former agent had resigned on 25 February 2020, he understood that the claimant had secured new employment. There was no explanation for the delay in instructing the present agent until November 2020. The application should be refused as not being in accordance with the overriding objective. No authority was cited.

The law

6. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to address that, save in respect of additional respondents in Rule 34, set out below. It falls within the Tribunal's general power to make case management orders set out in Rule 29 which commences as follows:

"**29 Case management orders**

The Tribunal may at any stage of the proceedings, on its own initiative or on application to make a case management order."

7. Rule 29 requires to be exercised having regard to the overriding objective in Rule 2. It states as follows:

"**2 Overriding objective**

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

8. Earlier iterations of the Tribunal Rules of Procedure did contain a specific rule on amendment, and the changes brought into effect by the current Rules, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, require consideration when addressing earlier case law.

9. The nature of the exercise of discretion in amendment applications was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. The EAT stated the following:

"Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

5 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 many different kinds, ranging, on the 10 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 15 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 20 whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, eg, in the case of unfair dismissal, s.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been 25 a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and 30 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. Questions of delay, 35 as a result of adjournments, and additional costs, particularly if they

> are unlikely to be recovered by the successful party, are relevant in reaching a decision."

10. In a number of cases distinctions are drawn between firstly cases in which the amendment application provides further detail of fact in respect of a case already pleaded, secondly those cases where the facts essentially remain as pleaded but the remedy or legal provision relied upon is sought to be changed, often called a change of label, and thirdly those cases where there are both new issues of fact and of legal provision on which the remedy is sought. The first two categories are those where amendment may more readily be allowed. The third category is more difficult for the applicant to succeed with, as the amendment introduces a new claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time. It is this third category of case that the present application falls into.

11. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said this in relation to an amendment which arguably raises a new cause of action, suggesting that the Tribunal should

> " … focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry 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."

12. In order to determine whether the amendment amounts to a wholly new claim, the third of the categories set out above, it is necessary to examine the case as set out in the original Claim to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v Bryant [1999] ICR 123***). In that case the claimant made no reference in her original unfair dismissal claim to alleged victimisation, which was a claim she subsequently sought to make by way of amendment. The Court of Appeal rejected the amendment on the basis that the case as pleaded revealed no grounds for a claim of victimisation and it was not just and equitable to extend the time limit. It said that the proposed amendment

'was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time'.

13. Section 123 of the 2010 Act provides as follows

"**123 Time limits**

5 (1) [Subject to [sections 140A and [section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

10 (b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to 15 which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at 20 the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

25 (a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

14. This therefore provides that the Tribunal has jurisdiction under the 2010 Act if a claim is commenced within three months of the act complained of, 30 but there are two qualifications to that, firstly where there are acts extending over a period when the timelimit is calculated from the end of that period, and secondly where it is just and equitable to allow the claim to proceed.

15. An act will be regarded as extending over a period, and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant ***(Barclays Bank plc v Kapur [1989] IRLR 387.*** It was also held in that case that it is only the continuance of the discriminatory act or acts, not the continuance of the consequences of a discriminatory act, that will be treated as extending over a period.

16. The Court of Appeal in ***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96*** stated that terms mentioned in the above and other authorities are examples of when an act extends over a period, and

> “should not be treated as a complete and constricting statement of the ‘indicia' of such an act. In cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what he has to prove, in order to establish a continuing act, is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period’.”

17. The assessment of what is just and equitable involves a broad enquiry with particular emphasis on the relative hardships that would be suffered by the parties according to whether the amendment is allowed or refused.

18. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time, and the exercise of discretion is the exception rather than the rule (***Robertson v Bexley Community Centre [2003] IRLR 434***), confirmed in ***Department of Constitutional Affairs v Jones [2008] IRLR 128.***

19. In ***Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327***, the Court of Appeal stated the following

> “There is no principle of law which dictates how generously or sparingly the ‘power to enlarge time is to be exercised’ (para 31).

> Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case 'is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it"

20. In Abertawe ***Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** the EAT stated that a claimant seeking to rely on the extension required to give an answer to two questions:

> "The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

21. No single factor, such as the reason for delay, is determinative and a Tribunal should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***

22. There is a wide discretion on whether to accept an amendment or not. Where issues of jurisdiction as to time bar arise it is competent to reserve that issue for later determination whilst allowing the amendment ***(Gallilee v Commissioner of Police of the Metropolis [2018] ICR 634***).

Discussion

23. Whilst the categories set out in ***Selkent*** are not exhaustive, and all matters are capable of being taken into account, they do provide a useful framework to consider the application against. I shall deal with each in turn:

(i) The nature of the amendment

24. The application adds what is an entirely new claim to the Claim Form which was restricted in the paper apart providing details to a claim of what is colloquially referred to as constructive dismissal. The claims sought to be added by the amendment are not linked to those facts set out in the

Claim Form save in a very limited way. There is no real causative link between the facts as pleaded and the amendment. Separately I do not accept the argument that little in the way of additional enquiry would be necessary. There are several areas where the facts are different, and materially so. They include (i) when the respondent had actual or imputed knowledge of disability (ii) what arose out of the claimant's disability (iii) whether the respondent can make out a defence of objective justification under section 15 (iv) whether the respondent applied the practice, a PCP the claimant alleges (v) if so when, as this appears to have been on more than one occasion (vi) whether that placed the claimant at a substantial disadvantage against those not disabled, and if so what that was (vii) what reasonable steps were required to avoid that disadvantage, all under section 20. That will inevitably involve a wide-ranging enquiry, which will add materially both to cost and delay. These factors all do not favour the granting of the amendment. Separately whilst the claimant argues for career loss, he accepts that he signed an RCO about a month before his resignation, accepting matters as set out above and that following his doing so the respondent could not employ him as a teacher. That is a substantial impediment to any claim at the point of what is said to be a dismissal. Separately, it is far from clear that the claimant's claims have reasonable prospects of success. The respondent has various potential defences, including that of objective justification under section 15 and what is or is not a reasonable step under section 20. There are others, including as to its knowledge. It is not easy for the claimant to argue knowledge when he did not claim disability discrimination in his Claim Form. Whilst the claimant argues that there are greater evidential burdens for the claim that was made in the Claim Form, it is far from clear that that is correct.

(ii) The applicability of time-limits

25. It is not disputed that the claim now made is outwith the primary period in section 123, by over 19 months. In some respects it may be longer. Some of the matters arising from disability or adjustments argued for may relate to events prior to the termination of employment by material periods, and not be conduct extending over a period, but for present purposes it will be

assumed that the date from which to calculate timebar is 21 February 2019 as the claimant contends. That is a material period of time. It is not however determinative, firstly as there is the issue of what is just and equitable, and secondly as in any event time-limits do not by themselves determine whether or not to allow the amendment. Here there are factors that do not favour the argument that it is just and equitable to allow the amendment. Firstly, the claimant was legally represented when presenting his Claim Form. Whilst it is argued that he had reduced cognitive abilities at that time he had sufficient to instruct his solicitor to set out detailed allegations, including those as to his mental health. Secondly, that Claim Form did refer to the claimant's medical condition to an extent, in respect of "extreme anxiety and stress", "the claimant suffered from depression and anxiety", "this negatively affected his career and mental health", "the bullying and harassment severely affected the claimant's mental well being" and reference to a letter from Dr Ewan Clark dated 26 January 2015. It did not however state any claim as to disability discrimination or any facts from which such a claim could be inferred. There is as already stated no real causative link between the pleadings and the amendment. Thirdly and significantly, the passage of time is material, and would cause the respondent material prejudice. It has referred to two issues, the first being the retirement of Mr Innes, an obviously important witness and someone less under the control and direction of the respondent accordingly, and secondly that the letter from Dr Clark referred to has not been found. The allegations made by the claimant date from 2010, both as to primary fact and as to what is said to be knowledge of his disability. That prejudice would be suffered by the respondent given the further passage of 19 months or more of time is I consider clear. It is both on the quality of evidence it may be able to obtain, and the additional cost of defending the claims the amendment seeks to introduce, which are not straightforward and involve new facts beyond those in the Claim Form to a significant degree. It would also involve a significant further delay. The prejudice suffered by the claimant in not allowing his amendment is less clear. As indicated above, there are several matters which the claimant requires to establish in evidence which he may not do, and there are potential defences which the claimant may be able to establish. The

claimant is not deprived of all remedy as his claim of constructive dismissal remains. The claimant does have the onus of proof in that regard, and there may be evidential burdens as he has referred to, but there are evidential burdens also in a discrimination claim for a claimant. Whilst at this stage the outcome of any such claim cannot be known, this is not I consider a claim that can be said to be a strong one or have reasonably good prospects of success, such as was the case in the ***Pizza Express*** case. These factors are I consider all ones that favour the refusal of the application.

(iii) The timing and manner of the application

26. As stated above, the application is made materially late. Whilst Mr Howie has relatively recently been instructed and no fault can be directed at him, that is not of itself sufficient. The former solicitor was in a position to seek an amendment when instructed had that been considered a realistic possibility. There is also in effect an unexplained period from 25 February 2020 until Mr Howie was instructed in November 2020, when the claimant was not represented but could have been. There has been a delay accordingly, and that delay is a material one. It is set against the statutory period in section 123 of three months, which is comparatively short. These considerations favour the refusal of the application.

(iv) Analysis

27. None of the factors are determinative in themselves. I accept that the claimant will suffer the potential for hardship if he is not able to make a claim which has no limit on the award that may be made if it succeeds, and I accept the assertion made by his new solicitor that his former solicitor did not advise him of the possibility of such a claim. That does not however mean that the application should be allowed. I require to weigh all the facts. The delay is highly significant, and does cause the respondent material prejudice, for reasons that have been explained rather than asserted in the abstract. If what the claimant says is accurate he may as the respondent says have a remedy of some kind against his former solicitor, although I express no view on that firstly as I am not aware of all the material facts, secondly as the solicitor has not had the opportunity to

comment and thirdly as the test for a claim of negligence is that no reasonably competent solicitor would have advised as was done, which requires expert opinion. Having legal advice at the time of the Claim Form does not mean that the application must be refused but it is a material factor to consider that weighs against allowing an amendment after such a long period of time. I also take into account the difficulties that the claimant would have in pursuing the claim set out in his amendment application, not least the effect of the RCO referred to, which he signed prior to resigning and which accepted matters to the extent set out above. I did not consider that this was a case where it was appropriate to reserve the issue of jurisdiction for evidence on whether it was just and equitable to allow the amendment to be received although late, as the assessment was one I considered appropriate to make from the information before me.

28. In all these circumstances I have concluded that it is not in accordance with the overriding objective to allow the application.

Conclusion

29. The application to amend is refused.

30. A Preliminary Hearing shall be fixed separately, to be held by telephone, to address case management.

Employment Judge A Kemp

Date of judgment: 3 March 2021

Date sent to parties: 4 March 2021