



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 1305847/2018

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Held in Glasgow via written submissions on 12 October 2020

Employment Judge R Gall

10 **Ms PM Kirkwood (deceased)**

**Claimant
Represented by:
Ms E Snowdon - Lay
Representative**

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Mitchells & Butlers Retail Ltd

**Respondent
Represented by:
Mr A Wilson -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunals that the claim is amended by addition of the following allegations of discrimination by the respondents against the claimant: -

- 25 (1) The alleged requirement by the respondents that the claimant take annual leave for hospital appointments or treatment in in the period between February 2018 and July 2018
- (2) The terms of an email from Mr Campbell, retail business manager with the respondents, to the claimant of 23 July 2018 in which he questions her ability or fitness to carry out her job. That email was in response to an email from
30 the claimant of earlier that day referring to time off being sought for chemotherapy.
- (3) The terms of an email from Mr Campbell to the claimant on 23 July 2018 which refers to the claimant leaving a meeting the previous week and to
35 having concerns that this is a regular occurrence within the business, leaving it at risk.

The case will be set down for a Case Management Preliminary Hearing by telephone to make arrangements for the hearing.

REASONS

1. This was a Preliminary Hearing (“PH”) involving consideration of papers. It was dealt with in chambers without attendance by parties. This was as set down by the Tribunal. Both parties were given the opportunity to make written submissions. Both parties tendered written submissions for consideration.
2. The claimant is represented by Ms Snowden. She has represented the claimant since commencement of the claim. Sadly, the claimant died immediately prior to the claim being presented. The respondents are represented by Mr Wilson.
3. The claim was presented on 5 December 2018. A PH for case management has been held on 3 occasions, being 23 September 2019, 28 January 2020 and 24 March 2020. In between those two case management PHs, a PH was held in relation to time-bar. One of my judicial colleagues heard that PH and extended time enabling the claims to proceed.
4. The claims brought are of constructive unfair dismissal and of discrimination. At the case management PH in September 2019 it was agreed that Ms Snowden would provide further specification of the claim. At the PH on 28 January 2020 Ms Snowden was given a period of 14 days from that date to produce this specification. Ms Snowden is not a qualified solicitor. She was a friend of the claimant and is representing her in this case.
5. At that PH on 28 January a case management PH was set down for 24 March. That was arranged with a view to the hearing being fixed, with relative directions being given. It was also anticipated that consideration would be given to the further particulars from the claimant, which would have been received by then, and the answers to them.
6. Further particulars of the claim were given in a timeline submitted by Ms Snowden on 10 February 2020. The coronavirus pandemic then intervened.

The respondents submitted their reply to the further and better particulars on 7 April 2020.

7. In that response, the respondents highlighted 4 elements which they said fell into the category of amendment to the claim rather than that of further particulars of the claim already pled.
8. Those four points were said to be:-
- (i) The recruitment by Ms Dickson of other employees between March and September 2017
 - (ii) The requirement that the claimant use annual leave to undergo oncology treatment.
 - (iii) The email exchange on 23 July 2018 in which Mr Campbell questioned the ability of the claimant to do her job.
 - (iv) The email of 23 July 2018 in which Mr Campbell questioned the claimant in relation to leaving a meeting during the previous week.
9. Prior to the first PH both parties had completed agendas. In the agenda for the claimant Ms Snowden had referred in paragraph D.4 to the email exchange and to the reference to Ms Kirkwood's health. At paragraphs D.7, D.9 and D.10 there was reference to annual leave being something the claimant required to take for hospital appointments/treatment. The agenda was submitted on 5 December 2019, the day the claim was presented.
10. I was satisfied that the 4 allegations set out above were new allegations in this claim in that they were not in the claim form. Although referred to in the agenda, the agenda does not form further and better particulars of claim. It may be treated that way by the Employment Tribunal. That however would require to be made clear. It is not a means of amending the claim to bring in new grounds of claim, although certainly could be a means of so proceeding if an appropriate element is specifically confirmed by the Tribunal as becoming part of the claim advanced.

Submissions*Submissions for the respondents*

11. The respondents referred to *Selkent Bus Company v Moore* 1996 ICR 799. They highlighted the well know principles detailed in that case. The case provides guidance to Employment Tribunals when there is an application to amend. It refers to the situation where a claimant seeks to bring in a new ground of claim. That was what the claimant sought to do here.
12. The Tribunal should refuse to allow the proposed amendments in this case. This was not a relabelling. Further grounds of claim were potentially going to be added by these amendments. Obtaining information from witnesses to enable a response might be difficult as witnesses were on furlough. The grounds set out were being advanced at a stage when they would be time-barred if presented as a new claim. The Tribunal would require to extend time to enable them to be added. It was not just and equitable to extend time. It was some 20 months since the claim had initially been presented.

Submissions for the claimant

13. Ms Snowden sent in a submission which was received by the Tribunal on 8 October 2020. She resubmitted the timeline which she had earlier provided. She enclosed the emails from 23 July 2018.
14. Her position was that the matters which were potentially to be added to the claim were not new. They illustrated the behaviour of Mr Campbell, it was said. The respondents were aware of these matters. They were examples of the claims in the initial claim, form ET1.

Discussion and decision

15. I could understand the approach of Ms Snowden to this matter. The respondents knew of the emails. Mr Campbell had written them. They were not therefore matters suddenly brought to the attention of the respondents.
16. Nevertheless, what is known to an employer and may well have been discussed between employer and employee before Tribunal proceedings are

commenced is only part of the claim if it is set out in the claim or permitted additions to it. To put it differently, if an allegation is made before the claim is presented, but it does not feature in the claim made at the time the hearing proceeds, a claimant is unable to make that allegation as part of the case before the Tribunal. If there is no advance warning or fair notice that a particular matter is part of the claim, objection is likely to be taken to evidence being heard about that matter. That objection is likely to be successful.

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17. The case of *Chandhok v Tirkey* 2015 ICR 527 saw the Employment Appeal Tribunal remind Employment Tribunals that they should “take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings”. It was made clear that the initial claim, form ET1 could not be added to or subtracted from as parties saw fit.
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18. I set out the position on this in relation to what was in the agenda forms. Specific questions are asked in those forms. Those questions may elicit answers which are helpful in clarifying what a party may mean in fuller or specific terms than is set out in forms ET1 and ET3. What the agendas do not do, unless permitted so to do by the Tribunal, is to add new grounds of claim or different defences.
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19. Reference therefore in this case to the agendas and to the mention there of emails and time off by way of leave for medical appointments and treatment does not mean that those elements are part of the claim made by virtue of those mentions alone.
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20. Ms Snowden is not legally qualified. I recognise that. The principles applicable to giving fair notice and to added new elements to the claim remain applicable to her, just as to any other representative or party.
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21. I was satisfied that amendment was required in order to have the 4 additional elements added to the claim. They were new allegations in the sense that they had not been made in the claim form or by permitted amendment.
22. The first element was that there had been recruitment by Ms Dickson of new employees between March 2017 and September 2017. These employees
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were said by the claimant to have personal connections to Ms Dickson and to have been taken on in order to start a “*vendetta*” against the claimant.

23. I decided that this was not something flagged up at an earlier point, looking beyond the pleadings. It was also difficult to understand the allegation without there being information as to what was said to have been involved in the vendetta by way of alleged discriminatory conduct. Recruitment of one or more employees without knowledge of what alleged discriminatory conduct those employees were said to have participated in did not in my view amount to an allegation which gave fair notice of a ground of claim. I was not prepared to allow the claim to be amended to bring in this allegation as a ground of claim. It may be that this is a reference to allegations of behaviour towards the claimant which behaviour is said to have been part of the basis of her decision to resign. That is a separate matter.

24. I therefore considered the *Selkent* principles in relation to proposed additions 2,3 and 4. I was of the view that although now being considered sometime after the claim was submitted, there were reasons for that. In part there was the fact that Ms Snowden believed that as the respondents were aware of the emails, these were not new matters. Factually that is accurate. In procedural terms, as mentioned, these aspects were not part of the claim. There has also been a degree of time lost due to the coronavirus pandemic. There was a PH set down for 24 March which might have dealt with this.

25. It is appropriate to consider prejudice if on the one hand amendment is allowed or if the other hand it is not. The prejudice to the claimant if amendment was not permitted was that it would not be possible to proceed with a claim based on these allegations. They were specific instances of what was said to have been a hostile working environment in my view. That was an allegation made in the claim form. These were therefore the type of details which would be likely to be regarded as further and better particulars of the “headline” allegation of there having been a hostile working environment. I recognised however that they were specific examples which had not appeared in the claim form. The reference to a hostile working environment might also be read as being a basis of the constructive unfair dismissal claim.

These specific matters were now being alleged to have been discriminatory in nature. They were in fact, therefore, new matters.

26. The respondents are not taken entirely by surprise in these points being sought to be added to the claim, however. They have been mentioned in the agenda return as set out above. The emails from Mr Campbell provide the “source material” for the allegations. Mr Campbell is scheduled to be a witness for the respondents. He was specified in the respondents’ agenda return as being a witness who would be giving evidence on their behalf.
27. I gave consideration to prejudice which would accrue to the respondents if I permitted the amendment and allowed parts 2,3 and 4 to become part of the claim. I recognise that the respondents would, in that circumstance, face specific allegations of discrimination which would not otherwise be in the claim. These are not matters of which they have no knowledge until now however. It is simply that they have not been part of the claim in specific terms. The emails have been known to them. I appreciate that as things stand it may be difficult to obtain immediate information from Mr Campbell given furlough and restrictions currently in place. It should possible however for instructions to be obtained in connection with judicial matters. Mr Campbell is involved in the defence of the case. He will be a witness. It is not therefore the case that he is to be unavailable. The points involved are quite specific and narrow. I did not regard the element and extent of prejudice to the respondents in permitting points 2,3 and 4 of the proposed amendment to be such that I would refuse the application to amend in relation to those points.
28. Considering all the *Selkent* principles, I concluded that the amendment to add to the claim the allegations specified in points 2,3 and 4 above should be permitted. I therefore allow amendment to that extent.
29. It seems appropriate to me to set down a further, I anticipate brief, case management PH to make arrangements for the hearing. That will involve consideration of preparation of documents for the hearing, whether it is to be held in-person or by video conference (CVP) and for how long and when the hearing will be set down.

30. In order to assist with consideration of the possibility of a video conference hearing, it may be helpful to be aware that a stable internet connection is necessary, as is a device with a camera and microphone. A quiet area where participation can take place without interruption is also required. The CVP platform used involves receiving an email and clicking on the link. It does not
5 require downloading of an app or of software. One potential attraction of a CVP video conference hearing is that it would take place approximately 2 or 3 months prior to an in-person hearing.

31. These are points which can be discussed and considered at the case
10 management PH. The Clerk to the Tribunals is requested to arrange a one hour case management PH on a date to suit parties and for the purposes mentioned.

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Employment Judge: Robert Gall
Date of Judgment: 13 October 2020
Entered in register: 28 October 2020
and copied to parties

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