**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102738/20 & Others (P)**

**Held on 30 March 2021**

**Employment Judge N M Hosie**

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| **Mr C I Nunez Medina & Others** | **Claimants Represented by Ms K Fraser, Aberdeen CAB** |
| **Rox Hotel LLP** | **Respondent Represented by Mr S Morris & Mr G Waddingham, Peninsula** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the claimants' application to amend is granted.

**REASONS**

**Claimants' application to amend**

1. By e-mail on 17 December 2020 at 15:14, the claimants' representative applied to amend the claim by including, *"a breach of contract claim for the respondent's failure to provide work (based on their contractual hours) between 21 March 2020 and notification of dismissal (various dates) (or*

*equivalent wages) in accordance with the EAT case of* ***Besong v. Connex Bus (UK) Ltd UKEAT/0436/04/RN****."*

2. The claimants' representative also sought leave to amend the claim by including a claim for compensation for failure to provide written statements of terms and conditions of employment.

3. The claimants' representative attached to her e-mail an amended claim form incorporating the proposed amendments.

4. She explained that the breach of contract complaint was not included in the original ET1 claim forms as these were prepared, "*without the benefit of advice at an uncertain and concerning time. Much of the work and collation of information was undertaken by the lead claimant (Mr Medina) who does not in fact have a claim for breach of contract as he received full pay in March and correct statutory notice pay entitlement. This fact coupled with the respondent's erroneous reference to the termination date being 21 March 2020 in correspondence to the claimants (despite the earliest notification being 27 March 2020 by text message) resulted in this claim being omitted or at least made it extremely difficult for the party litigants to pick up on this claim.*"

5. She also drew to the Tribunal's attention that the claimants' had ticked the box for "other payments" at para. 8.1 in the originating claim form.

6. She also referred to a spreadsheet which was sent to the Tribunal and the respondent's representatives on 18 August 2020 on receipt of the respondent's ET3 response form. She submitted that this spreadsheet provided the respondent with *"fair notice"* of the breach of contract complaint and submitted that the application to amend was a *"relabelling exercise".*

7. She further submitted that: "*If the tribunal does not allow this application to amend, the claimants' will be prejudiced by being unable to effectively use the tribunal system as party litigants for this claim for breach of contract.*

*Given that the respondent had a further three weeks from receiving this application to amend to respond to better and further particulars, we do not consider that the respondent is prejudiced by this application particularly as we understand that the respondent's representatives still need to take instructions on the other claims included within the original ET1 claim form…..*

*Whilst we do not agree that all claimants were notified of dismissal on 27 March 2020, we do agree that the respondent did not notify the claimants of dismissal on 21 March 2020 as originally noted in the ET1 claim form and letters sent to claimants. As such, the respondent is already aware that there was a period where no work was offered between the temporary closure and notification of dismissal and should have been aware of their legal obligations given their access to legal advice. The respondent rightly paid salaried staff their full wage during the temporary closure period and notification of dismissal and therefore appears to be aware of the requirement to do so.*"

8. The claimants' representative also submitted that the claimants' recollection of events would not be affected by the application to amend particularly as there was relevant, contemporaneous, documentary evidence.

**Respondent's objection**

9. By e-mail on 15 January 2021 at 19:30, the respondent's solicitor intimated his objection to the claimants' application to amend. The following are excerpts from his e-mail:-

"*In response we would respectfully point out that the law does not imply any obligation on employers to provide work for employees so long as wages due are paid.*

*There was no express (either verbal or written) contractual term obliging the respondent in this case to provide work to the claimant.*

*All wages due have been paid, with the particulars of such payments set out in the respondent's ET3 in conjunction with the further and better particulars of that defence.*

*For the avoidance of uncertainty, there was no contractual obligation requiring the respondent to pay further wages or provide work to the claimants in relation to whom this amendment application is made.*

*Further, the claimants' representative is seeking leave to introduce a new claim not set out in the ET1. The claims made related to redundancy and underpayment of holidays, constituting unlawful deductions from wages. Breach of contract is a separate legal claim.*

*I would highlight how the amendment application relies on facts known to the claimants when submitting that ET1 yet which are not particularised within the ET1.*

*In addition, this new claim is put forward outside of the statutory time limit. The application advances no evidence to show that it was not reasonably practicable for the claimants to submit that claim on time or indeed timeously prior to the date when this application was submitted on 17 December 2020. The claimants have been represented with the benefit of legal advice for months now; the Tribunal will have note of the date when their legal representative first came on record.*

*The claimants' representative argues that the respondent would be prejudiced by granting this application to amend. On behalf of the respondents I dispute this assertion.*

- *Permitting this amendment would allow a new legal claim to be advanced which, if successful, would result in an award of damages.*

- *The claimants have already, with the benefit of their representative, applied once to amend the claim submitted within their ET1 forms. Now yet another application is submitted, detailing a further claim. The respondent contends it would not be in accordance with statute, which imposes limitations on the time within which claims must be presented, on a public policy basis, or with the overriding objective, to give leave for these additional claims to be added.*"

10. The respondent's solicitor also opposed the application to introduce a complaint of a failure to provide a written statement of terms and conditions of employment. He submitted that such a complaint was known to the claimants when the ET1 form was presented any yet it is not particularised within the claim form. He also submitted that the complaint had been submitted, "*outside of the statutory time limit*" and there was no evidence advanced to show that it was not reasonably practicable for the claimants to submit this claim in time; and that the respondent would be prejudiced were this application to be granted.

**Claimants' response**

11. The claimants' representative responded by e-mail on 18 January 2021 at 10:50. She submitted, with reference to ***Janeczko v. Reed Medical Ltd*** *ET Case No. 2401245/05*, that while there is no general duty to provide work for an employee, there is a duty to pay wages and, "*for some of the claimants their position is that neither work or wages was provided during the period between the temporary closure and notice of dismissal.*"

12. She disputed that this was, "*now yet another application is submitted, detailing a further claim.*"

13. She referred again to the "spreadsheet" which the claimants had been unable to attach to the claim form but whicj had been copied to the respondent on 18 August 2020.

**Case management preliminary hearing**

14. I conducted a preliminary hearing to consider case management on 24 February 2021. The Note which I issued following that hearing is referred to for its terms. I directed the respondent's representative to clarify the position concerning the respondent's solvency. It was also agreed I would consider the claimants' application to amend *"on the papers":* on the basis of the parties' written submissions to date.

15. By e-mail on 24 February 2021 at 12:47, the claimants' representative advised that she understood that the respondent *"is not in administration"* and that she had been advised by the Redundancy Payments Office that they would require a Tribunal Judgment before any payments could be made to the claimants of any sums due. She also went on in her e-mail to summarise the position concerning her application to amend.

**Respondent's response**

16. The respondent's representative responded by e-mail on 10 March 2021 at 18:14. He attached to his e-mail confirmation from the solicitors representing the Respondent that, "*no action has been taken to place the Company into administration or liquidation. The Company has simply ceased to trade and is assessing its position in relation to the unprecedented trading conditions.*"

17. The respondent's representative went on in his e-mail to make the following additional representations in relation to the claimants' application to amend:-

"*I am invited to comment on an e-mail from the claimants' representative copied below from 24 February, which for the most part reiterate comments made in writing previously when she made a written application to amend the claim on 17 December 2020. My response to that application has already been made by e-mail dated 15 January 2021, but add the following:*

- *I believe it correct, as stated by the claimants' representative, that a spreadsheet was e-mailed to the Tribunal on 18 August 2020*
- *It is not in dispute that the claimants' representative provided further and better particulars on 10 October in accordance with Tribunal directions*
- *The latter mentioned breach of contract claims, and at that point in time both the claimants' themselves and the claimants' representative had set out in writing some claims for breach of contract*
- *However what is clear is that the claimants' representative on 17 December made an application to amend the claims accepted by the Tribunal, particularising further what contractual breaches which are alleged and for which compensation is sought. It is this amendment application including additional alleged breaches of contract which we oppose*
- *The claimants' representative position is that unspecified and unparticularised references to contractual breaches, together with pleaded facts, evidenced that the respondent had full knowledge of all claims made by the claimants*
- *Our position is that it was not the case. We respectfully refer Judge Hosie to the relevant correspondence to determine the position and apply the relevant law in relation to the appropriate time limits.*"

**Claimants' further response**

18. By e-mail on 19 March 2021 at 12:52, the claimants' representative responded further as follows:-

"*Thank you to the Tribunal for the opportunity to provide further comment and to the respondent's representative for confirming that the respondent remains solvent/will advise of any changes to the position.*

*For ease of reference, I attach the e-mail which was sent to the Tribunal and the respondent's representative's e-mail address, as per the ET3 form, on 18 August 2020. This is the e-mail referred to in the e-mail below when the respondent's representative states 'I believe it correct, as stated by the claimants' representative, that a spreadsheet to the Tribunal on 18 August 2020.'*

*The attached e-mail contains a spreadsheet from which the relevant extracts were noted within the application to amend. The spreadsheet referred to is attached to the e-mail as a PDF named "02 Schedule of Underpayments". It is necessary to zoom in on the spreadsheet to read it. As noted in the application to amend, the party litigants referred to a spreadsheet in the original ET1 claim form, which they were unsure how to attach when submitting the claim.*

*I note that the respondent's representative states that 'the claimants' representative on 17 December made an application to amend the claims accepted by the Tribunal, particularising further what contractual breaches which are alleged and for which compensation is sought', I would like to point out that:*

1. *the application to amend was subsequent to a preliminary hearing on 3 December 2020 at which the respondent's representative raised (for the first time) that he considered that an application to amend was required for the breach of contract claim noted within the further and better particulars, and*

2. *that the application to amend did not provide further particulars of the breach of contract claim. The application to amend simply confirmed, using track changes, the parts of the further and better particulars submitted on 9 October 2020, which the respondent's representative advised should have been submitted as an application to amend, rather than as further and better particulars. The application to amend and the further and better particulars are identical in terms of content.*"

**Discussion and decision**

19. In ***Cocking v. Sandhurst (Stationers) Ltd*** [1974] ICR 650, Sir John Donaldson, delivering the Judgment of the NIRC, laid down a general procedure for Tribunals to follow when considering amendments. He set out the key test at 657D –

"*In deciding whether or not to exercise their discretion to allow an amendment, the Tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties including those proposed to be added, if the proposed amendment were allowed or as the case may be refused.*"

20. The guidelines in ***Cocking*** were approved and restated in ***Selkent Bus Co. Ltd v. Moore*** [1996] ICR 836. In that case, the EAT emphasised that the Tribunal, in determining whether to grant an application to amend, must carry out a careful balancing exercise of the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to parties by granting or refusing the amendment.

21. Useful guidance on this issue was also given by the EAT in ***Argyll & Clyde Health Board v. Foulds & Others*** UKEATS/009/06/RN & ***Transport & General Workers' Union v. Safeway Stores Ltd*** UKEAT/0092/07. In both these cases, the EAT referred, with approval, to the terms of paragraph 311.03 at Section P.1 in Harvey on Industrial Relations & Employment Law:-

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

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

22. Guidance was also provided by Mummery LJ at pages 843 and 844 in ***Selkent***:-

"……..

*(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of granting 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 have many different kinds, ranging from, on the one hand, the correction of clerical and typing errors, additions of factual details to existing allegations and the addition or substituting a further label for facts already pleaded to, to, on the other hand, making of entirely 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 wholly because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time, before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts and information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting amendments. Questions of delay, as a result of adjournment and additional costs particularly if they are unlikely to be recovered by the successful party are relevant in reaching a decision.*"

**Present case**

**Nature of the amendment**

23. I was satisfied that the application to include the complaints of breach of contract and a failure to provide a written statement of terms and conditions of employment were linked to and arise out of the same facts as the original claim. In effect, this was a "relabelling exercise".

24. In any event, a claim for compensation for failure to provide a written statement of terms and conditions of employment is not a free-standing right. In terms of s.38 of the Employment Act 2002 the right to compensation is dependent upon a successful claim being brought by the employee under one of the jurisdictions listed in Schedule 5 (whether or not the Tribunal would otherwise have awarded compensation). In that event, the Tribunal ***must*** *award* the *minimum amount of two weeks' pay*" and may, if it considers it just and equitable in the circumstances, award the "*higher amount of four weeks' pay*". This is on top of any award the Tribunal may have already made in respect of the main claim. Arguably therefore, this is not a separate head of claim but in any event, there is still a requirement to provide "fair notice".

**Applicability of time limits**

25. I was mindful that the formal application to amend was not made until 17 December 2020 and as the claimants were dismissed in March 2020 this was well outwith the three-month time limit for bringing claims of this nature. However, as the claimants' representative submitted, there was reference to the breach of contract claim in the spreadsheet which was e-mailed to the Tribunal on 18 August 2020 and in the claimants' further and better particulars of 10 October.

26. I was also mindful that when the claimants submitted the claim form they were not represented and there are a variety of claims by a number of claimants. In my view, had time bar been the only issue, there would have been a reasonable prospect of the Tribunal exercising its discretion and allowing the claim to proceed on the basis that it had not been *"reasonably practicable"* to submit the claim in time.

27. Further, as Mummery LJ said in ***Selkent***, the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise.

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

28. I have already set out above the timing and manner of the application. The respondent had knowledge of the breach of contract claim some time before the formal application to amend. Were I to refuse the application, the claimants will not be able to pursue a claim which, at least on the face of it, is stateable. On the other hand, were I to grant the application, the respondent will require to defend the claim but I am not persuaded that that will involve significant additional expense or that the progress of the claim will be delayed.

29. I am also satisfied that were I to grant the application that the cogency of the evidence would not be affected.

30. I am satisfied, therefore, that the balance of prejudice favours the respondent.

31. I decided, therefore, in all the circumstances that the application to amend should be allowed. In arriving at this view I was mindful, as Underhill LJ noted in ***Abercrombie & Others v. Aga Rangemaster Ltd*** [2014] ICR 209 that Mummery LJ's guidance in ***Selkent*** "*Was not intended as prescribing some kind of a tick box exercise……..It is simply a discussion of the kinds of factors*

*which are likely to be relevant in striking the balance which he identifies under head (4). No one factor is likely to be decisive. The 'balance of justice' is the paramount consideration.*"

32. In arriving at my decision I was also satisfied that it was consistent with the "overriding objective" in Tribunal Rules of Procedure and the "interests of justice".

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| **Employment Judge** | **N M Hosie** |
| **Dated** | **14th of April 2021** |
| **Date sent to parties** | **14th of April 2021** |