



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107238/2020(P)

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Held on 24 May 2021

Employment Judge: J M Hendry

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Mr C Eyre

**Claimant
Represented by
Mr A Roberts,
Solicitor**

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Helix Offshore Crewing Services Limited

**Respondent
Represented by
Ms L Townley,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The claimant's application to amend is refused.

REASONS

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1. The claimant in his ET1 sought a finding that he had been unfairly dismissed from his employment as a deck electrician by the respondents. The ET1 was completed with the assistance of his legal representative. He gave details of his claim which related to his dismissal allegedly for using unsafe working practices offshore.

E.T. Z4 (WR)

2. The respondents in their ET3 accepted that the claimant had been dismissed and took the position that the dismissal was not unfair. The ET1 was lodged on 12 November 2020.

5 3. The case progressed and was transferred to Aberdeen for case management. On 18 January the claimant's agent wrote to the Tribunal seeking permission under Rule 30(1) to add a claim for disability discrimination (dyslexia and harassment and bullying). They set out the reasons in their letter for applying for the amendment at this stage. The
10 grounds for the application was that the claimant suffered from dyslexia. He wrote:

15 *"He brought it to the attention of his manager on more than one occasion during "one-to-one performance interviews" and other occasions. He explained his difficulties with e-mails/written work, spelling and slow thought process. Accordingly, this disability makes it challenging to write e-mails/written work, he finds spelling a challenge to the point where he is constantly rephrasing sentences to avoid using certain words as spellchecker finds it challenging to find the word he is trying to spell. He also suffers from a slow thought process, this can sometimes be noticed in conversation."*
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4. It was indicated the claimant had completed the ET1 himself and he had stated under section 12 that he had a disability namely dyslexia. It was suggested that the claimant had mistakenly ticked it when completing the ET1
25 as he would have made a claim for disability discrimination. In relation to harassment and bullying various events were narrated on a factual basis for such claims. The incidents are not dated. It was not clear over what period the bullying and harassment was meant to have taken place. It was suggested that the claimant had made his manager aware of his condition
30 and that the respondent made aware of his condition should have ensured he was not directly or indirectly bullied.

5. By e-mail dated 4 February the respondents opposed the application and pointed out that these were new claims based on new factual assertions and
35 that it was not a situation that could be described as relabelling. The ET1

made no reference to alleged disability or allegations of disability discrimination. His position was that if the claimant had genuinely believed at the time of making the claim he had been subject to disability discrimination direct or indirect or a failure to make reasonable adjustments, harassment or bullying then he would have made some reference to these allegations in the ET1 or in the Early Conciliation process. Their position was there was insufficient explanation to show why the amendment came at this point. On what occasion was there for a delay?

6. He pointed to the issue of time-bar. The claimant's employment terminated on 20 August and any discriminatory acts must have taken place on this date or prior to it. His position was that it would not be just and equitable to allow the complaints out of time. They also took issue about the particularisation of the complaints and the delay in making the application. The respondent's position was that they were wholly unaware of the claimant's alleged disability nor was it clear from the amendment how the alleged disability contributed to the unfair dismissal claim. His position was that the respondents would be prejudiced involving significant time and cost understanding any new claims and seeking to defend those.

Judgment

Relevant Law

7. The claimant seeks to amend his application to include claims for disability discrimination. The Tribunal has wide powers of amendment. The starting point for the Tribunal is the "Overriding Objective" in Rule 2 which provides:

"2. 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

5 *(e)saving expense.*

.....”

8. A Tribunal must seek to give effect to the overriding objective in interpreting, or exercising any power given to it in the Rules. In the context of applications
10 to amend the Tribunal should have regard to the case of **Selkent Bus Company Ltd v Moore** [1996] IRLR 661 (which was followed by the EAT in Scotland in **Amey Services Ltd and another v Aldridge and others UKEATS/0007/16**). The EAT held that, when faced with an application to amend, a Tribunal must carry out a careful balancing exercise of all the
15 relevant circumstances, weighing up the balance of injustice or hardship that would be caused to each party by allowing or refusing the application. This would include the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

20 9. In this case the amendment purports to introduce claims which appear clearly time barred. The time limit for a discrimination claim to be presented to a Tribunal is 3 months starting with the act complained of (section 123(1), 25 Equality Act 2010). Section 123(3)(a) of the Equality Act 2010 provides for continuing acts of discrimination, where acts of discrimination extend over a
25 period are treated as having occurred at the end of that period. The question a Tribunal should ask in such circumstances is whether the employer is responsible for an “an ongoing situation or a continuing state of affairs” in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (**Hendricks v Metropolitan Police Commissioner** [2002] EWCA Civ 1686). There must be facts and
30 circumstances which are linked to one another to demonstrate a continuing discriminatory state of affairs. The Tribunal should consider the nature of the conduct and the status or position of the person responsible for it.

10. The Tribunal has the power to grant a just and equitable extension of time if a claim is out of time. It can allow a late claim to be presented in such further period as it considers just and equitable (section 123(1)(b)). In the case of **British Coal Corporation v Keeble & Others** [1997] IRLR 33 sets out a checklist of factors which a Tribunal should consider when deciding whether to refuse or grant an application to extend the time limit. These are: a) The length of and reasons for the delay, b) The extent to which the cogency of the evidence is likely to be affected by the delay, c) The extent to which the party sued had co-operated with any requests for information, d) The promptness with which the Plaintiff acted once he or she knew of the facts giving rise to the cause of action. e). The steps taken by the Plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.
11. In the case of **Mensah v Royal College of Midwives** UKEAT/124/94, Mummery J said that knowledge is a factor relevant to the discretion to extend time. Tribunals are therefore entitled to ask questions about a claimant's prior knowledge, including: when did the claimant know or suspect that they had a claim for discrimination; was it reasonable for the claimant to know or suspect that they had a claim earlier; and if they did know or suspect that they had a claim, why did they not present their complaint earlier.
12. Amendment is often granted where it can be argued that the ET1 contains facts which support the amended claim and that the exercise is one of "relabelling" Unfortunately that is not the situation that pertains here. The claimant has not pled anything in the ET1 which is suggestive of a claim for disability discrimination. He has not linked the disciplinary matter to any issue involving his dyslexia. He had not 'ticked' the box that confirms he is making a discrimination claim. The proposed amendment is wide reaching attempting as it does to introduce claims for disability discrimination.
13. Unfortunately, the proposed amendment is also a little unclear on how the disability and suggested discrimination interacts with the dismissal. There is reference to the completion of paperwork for the task but it was the way in

which the job was set up that led to the dismissal. Any issues of paperwork seem secondary.

- 5 14. Looking at all the incidents pled and relied on by the claimant in the proposed amendment it is not entirely clear as to how the alleged disability (Dyslexia) gives rise to any claims and over what period they are said to have arisen. There are numerous issues of specification that would arise if any amendment was allowed to proceed and this is concerning. The amendment refers to the claimant being often “verbally threatened” and no dates are given not details of the alleged threats. It continues that the claimant 10 ‘mentioned this on several occasions’. Again, the occasions are not detailed so as to give the respondent company notice of when they occurred or provide details to allow the circumstances to be identified. Allowing the amendment in this form would inevitably lead to delay and occasion the respondent further 15 cost.
15. In any event the incidents appear out of time and there is no explanation why a claim was not made at the time (of the incidents) or when the current proceedings were raised if they were thought to be relevant. Although the 20 claimant put his representative’s details on the ET1 the file discloses that his position is that he completed the ET1 before taking legal advice but there is no explanation why the amendment comes at this stage in proceedings a couple of months after the claim was raised and what impediments there were in the way of the claimant making claims earlier. This is not a major 25 consideration and there have no doubt been delays caused by the Pandemic and the difficulty that has caused in getting legal assistance. Overall the delay is not something I place any weight on as the proposed amendment came before the first case management hearing.
- 30 16. If refused I accept that the claimant will lose his rights to make claims for disability discrimination but he still has a claim for unfair dismissal. If the disability truly played a part in events and the employers ignored it’s potential impact perhaps in mitigation then the claimant can still raise these matters as relevant background in his claim. The lack of specification of the claims and

5 their possible age also raises the issue that the evidence of what are likely to
have been transitory events will have been damaged by the delay. In the
present circumstances I am of the view that the balance of hardship would be
with the respondent company having to face claims that are unclear and time
barred and that if allowed it would mean that they would have to spend
considerable time and effort to respond to the pled claims occasioning
expense and delay. Accordingly, the amendment is refused.

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Employment Judge

J M Hendry

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Dated

26th of May 2021

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Date sent to parties

26th of May 2021