



EMPLOYMENT TRIBUNALS

Claimant: Mr A Haskard

Respondent: The White Wall Company Limited

JUDGMENT

1. The application to amend the claim is allowed and the Claimant may therefore pursue the complaint that he suffered a detriment for asserting his rights under the Working Time Regulations 1998. The detriment is the termination of his contract.

REASONS

1. At a Case Management Hearing on 13 May 2021, I gave directions for the hearing of this claim.
2. As previously noted, the claim was brought on 16 November 2017 and, on 11 December 2018, there was a Preliminary Hearing at which EJ Nash held that the Claimant was a worker pursuant to the Employment Rights Act 1996 s.230(3)(b). That judgment was appealed, but the appeal was dismissed by the Employment Appeal Tribunal on 4 December 2019.
3. Meanwhile, the Claimant had made an application on 17 May 2019 to amend the claim, which was never heard. With the agreement of the parties and to avoid any further delays, I have decided that application on the papers.
4. The application to amend was, *“to include a further claim for detriment under s.45a Employment Rights Act 1996 (“ERA”), namely protection from detriment for asserting rights under the Working Time Regulations 1998”*. The application stated that no further particulars were necessary, as the claim was in the existing particulars at paragraph 8.2 of the Claim Form, namely:

“On 18/08/17 by email (on the advise of an accountant) I politely disclosed to Ashley Elliot, in the interest of the public, that I had recently become aware that, under the conditions of my employment at WWCo, I (and by implications others) had been entitled to the legal rights of Holiday and Sick

Pay for the duration of my employment.

On 19/08/17 I received Ashley Elliot's angry response by email, ending my employment immediately".

5. At paragraph 8.1 of the Claim Form, the Claimant listed other types of claims and included the following: "*Unfair Dismissal, Wrongful Dismissal, Whistle Blower, Suffering Detriment for Asserting Legal Rights*".
6. The application stated that, this was "*a pure relabelling exercise of the Claimant's current claim for detriment under s.47b and is pleaded in addition to that claim*".
7. The Respondent sent its response to the application for permission to amend on 28 May 2021. It set out the procedural background and then dealt with the timing of the application. By the Respondent's calculation, the primary limitation period ended on 19 December 2017, so that the application to amend was about 17 months out of time. It was pointed out – correctly – that there was no explanation for this delay and arguments were set out about the prejudice caused. It was also pointed out that the Claimant had the benefit of professional representation for some months before the application was made.
8. The Respondent took issue with the reference to this being no more than relabelling exercise, stating that, "*it involves a wholly new level of enquiry and is an attempt at recasting the current claim in a wholly new light, requiring ultimately a greater exposition and consideration of the Respondent's thought processes in respect of the matter complained of. It would open up a whole new line of enquiry*".
9. The response referred at some length to the EAT's decision in **Pontoon Europe Ltd v Shinh** UKEAT/0094/18, which concerned an amendment application. This in turn set out the well-established guidance provided in **Selkent Bus Co Ltd v Moore** [1996] ICR 836. Mummery LJ referred to the relevant circumstances as including the nature of the amendment, the applicability of time limits and the timing and manner of the application.
10. The Claimant sent his further submissions in response on 11 June 2021. He restated the basis of the application and took issue with the Respondent over whether this was relabelling. He also disputed the points about representation, on the basis that a law centre can only provide limited representation. In dealing with time, however, he did not explain exactly why the application was made so late.
11. In reaching my decision, I have had in mind the following points:
 - (i) the Claimant explicitly referred in his ET1 to his rights under the Working Time Regulations 1998, by reference to "*holiday pay*" and to his employment being ended in response.
 - (ii) He also explicitly listed as one of his complaints "*suffering detriments for asserting legal rights*".
 - (iii) The Respondent clearly understood the Claimant to be bringing that claim, because it responds to it at paragraphs 24 and 25 of the Grounds of

Response. Its defence was that he was a self-employed contractor.

(iv) Mummery LJ made it clear in **Selkent** that this issue, i.e. the nature of the amendment, should be considered first, before any time limitation issues are brought into the equation, as it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint.

(v) In my judgment, the proposed amendment is not adducing a new complaint, but labelling what is already there. That being so, I do not think it matters whether the amendment was brought within the timeframe for that particular claim or not.

12. However, the Tribunal must still review all the circumstances, including the relative balance of justice, in deciding whether to allow the amendment. I have revisited the agreed list of issues and it does not seem to me that allowing this amendment will prejudice the timetable, nor that it will require any significant additional disclosure (if any at all) or witness evidence. Whilst I accept that it may require, "*a greater exposition and consideration of the Respondent's thought processes*", it does not seem to me that prejudice outweighs the prejudice that would otherwise be caused to the Claimant, who plainly intended to raise this complaint.

13. In those circumstances, the application is allowed and the Claimant may therefore pursue the complaint that he suffered a detriment for asserting his rights under the Working Time Regulations 1998. The detriment is the termination of his contract.

14. I should also note that I received an email on 5 July 2021 from Camden Law Centre advising of a change of representative, from Mr Godfrey (who represented the Claimant at the hearing) to Ms Morrison.

Employment Judge Cheetham QC
Date: 10 July 2021

Sent to the parties on
Date: 15 July 2021