



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4113563/19 (V)

Heard by CVP on 16 September 2020

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Employment Judge Cowen

Mrs R Quarcoo

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**Claimant
Represented by
Mr Stephenson
Counsel**

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Crown Office (The Scottish Ministers)

**Respondent
Represented by
Mr Carey
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The issue for the Open Preliminary Hearing

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1. As set out at the PH before EJ d'Inverno on 16 June 2020, the issues for consideration by this tribunal were;

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a) whether, by reason of time bar, the "Particulars of Claim" contained in a paper apart first intimated to the respondents and tendered to the Tribunal on the 15th of March 2020 should or should not be received and allowed to form part of the claimant's pleaded claim; ("Issue A") and

b) Let it be assumed that the Particulars of Claim of 15th March 2020 are received and allowed to form part of the claimant's pleaded

claim, has the claimant Title to Present and the Tribunal Jurisdiction to Consider her claims as so particularised by reason of asserted time bar ("Issue B").

5 **The Facts**

2. The Claimant resigned from her position on 4 September 2019 and her effective date of termination was 8 September 2019.
3. The ET1 was received on 27 November 2019 making claims for unfair dismissal and race discrimination with an assertion on the ET1 form that the claims were exempt from the requirement to register with ACAS for early conciliation prior to issuing the claim. The claims were rejected on 2 December 2019 by a notice sent to the Claimant's representative. The reason for rejection was due to no such EC exemption being applicable. The Claimant became aware of this on 5 December when she contacted the tribunal to ask about the progress of her claim.
4. On 16 December 2019 the Claimant wrote to the Tribunal to ask for reconsideration of her discrimination claims to be accepted. She also indicated that her previous adviser Mr Akinsanmi was not a qualified lawyer and had provided incorrect advice, as he did not tell her of the need to register a claim for early conciliation with ACAS. The Claimant enclosed an EC certificate which was issued on 9 December having been registered the same day. The Claimant therefore provided a valid EC certificate number on 16 December 2019.
5. The tribunal indicated to the Claimant that her claim was accepted on 27 December 2019, although no paper apart was attached to the ET1 to provide details of the claim.
6. On 6 January 2020, the Respondent sought a copy of the paper apart, which the ET could not provide. On 9 January 2020 the ET wrote to the Claimant to request a paper apart. It was at this point that the Claimant discovered that the Grounds of Claim, (also referred to as the Particulars of Claim), had not been filed with the ET1. She provided the Tribunal with a copy of this

document on 15 March 2020, which also purports to include a claim for disability discrimination.

7. An ET3 was filed with the tribunal on 23 January 2020, requesting further particulars of the claim and asserting a time bar on the claims made.
5 Thereafter on 29 January the claim and response were accepted by EJ Eccles and a preliminary hearing was listed for 27 March 2020.
8. At the Preliminary Hearing on 27 March 2020, before EJ d'Inverno, the Claimant accepted that the particulars of claim were not attached to the ET1. An order was made specifying that the claim was not rejected for lack of
10 specification. The Claimant was given an opportunity to provide further details and the Respondent an opportunity to amend their response if appropriate. The claim for unfair dismissal was also dismissed upon withdrawal.
9. The Claimant provided the document in accordance with the order and also an Amended Grounds of Claim to the ET1 on 24 April 2020.
- 15 10. On 16 June 2020, the matter was set down for a preliminary hearing to address the jurisdiction and time bar points.

The Law

Rejection of claim

- 20 11. Rule 12(2) of the Employment Tribunal (constitution and rules of procedure) Regulations 2013 an ET1 can be rejected if, amongst other things;
- a) the ET has no jurisdiction to consider it,
 - b) It is in a form which cannot be sensibly responded to,
 - c) it institutes relevant proceedings, but does not contain an EC number
25 or confirmation that an exemption applies
12. The tribunal was taken to the case of Chohan v Derby Law Centre [2004] IRLR 685 in relation to the proposition that the failures of the legal representative as to time limits should not be visited upon the Claimant.

Continuing Act

s.123 Time Limits

(3) For the purposes of this section—

- 5 (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.

10 Time Bar*s.123 Time limits*

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

- 15 (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.

Amendment

20 The Tribunal was reminded of the case of *Cocking v Sandhurst (Stationers) Ltd* and other [1974] ICR 650, where the process of considering an application to amend to include other claims was set out.

Similarly the principles in *Selkent Bus Co Ltd v Moore* [1996] ICR 836 where it was stated by Mummery J, that the Tribunal should take into account all the circumstances including;

- 25 - The nature of the amendment,
- The applicability of time limits and the timing of the application,
- Balancing the hardship and injustice of allowing the amendment against the hardship and injustice of refusing it,

Decision

Issue A

- 5 13. The claim was accepted by the ET on 16 December 2019 when the EC certificate was filed and is therefore a valid claim. The ET1 had the issues of Unfair Dismissal (now dismissed) and race discrimination ticked on the form at box 8.1. The Claimant therefore indicated from the outset and the Respondent understood from the end of December 2019 when it received the claim, that a claim of some description based on the protected characteristic of race was being made.
- 10 14. The Tribunal finds that the Claimant was not aware of the failure by her representative to file the Grounds of Claim, until 9 January when the ET requested the paper apart from the ET1. It took the Claimant until 15 March 2020 to provide the Grounds of Claim, although the Claimant asserts that this document was available for her representative to file with the ET1 in November 2019.
- 15 15. The Grounds of claim that were first provided on 15 March 2020 were the first opportunity for the Respondent to be aware of the details of the claim which were being made. These details were provided after the initial ET1 was filed and accepted by the ET. Neither party has drawn the Tribunal to any rule, or authority which suggests that details of the allegations made must be filed within a specified time limit.
- 20 16. The Tribunal has taken into account the fact that EJ d'Inverno at the PH on 27 March 2020 under the powers of rule 26 ordered the Claimant to provide further and better particulars of these Grounds of Claim.
- 25 17. The Tribunal has considered the case of Secretary of State for Business, Energy and Industrial Strategy v Parry and Another [2018] EWCA Civ 672 which stated that a claim should only be rejected where the judge can be sure that it cannot sensibly be responded to. Otherwise, the ET should accept the claim and the Respondent can request further and better particulars if
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necessary. This appears to be exactly what has occurred in the present case, without any prejudice to either party.

18. The Tribunal considers that there is no rule or time limit to prevent the Grounds of Claim being accepted by the Tribunal and hence no consideration of just and equitable need be considered at this stage.

Issue B

19. **The Second issue for this Preliminary Hearing is whether any of the points raised in the Grounds of Claim are out of time.**

Continuing Act

20. The acts set out in the Grounds of Claim extend from 21 November 2017 to 6 September 2019 and are said to be carried out by the Claimant's line manager and Head of Department amongst others. It is not for this tribunal to decide whether there is a continuing act shown by the allegations, as that will require consideration of the evidence, findings of fact and the application of the law to those facts. Those are matters which will have to be addressed in a final hearing. At this preliminary stage, the Tribunal must consider whether the allegations are capable of amounting to a continuing act.

21. The Respondent asserts that the time limit started to run either on 24 July 2019 on the date of the last act of discrimination which is asserted, save for the resignation, or on 15 August, the Claimant's last day of active work.

22. The Claimant asserts that she made a number of complaints of race discrimination in July 2018 and October 2018 and that the failure to address these led to her absence from work and ultimately her resignation. The Claimant asserts that her resignation on 6 September 2019 was an act of discrimination. The evidence in relation to this point will require to be tested at trial. It is possible, based on this assertion that the series of events could amount to a continuing act. The Tribunal at the final hearing will consider whether there is in fact a continuing series of events within the allegations.

Time Bar

23. The Claimant's final pleaded allegation is dated 6 September 2019, although the Respondent accepts that the effective date of termination was the 8 September 2019. The Claimant's claims are both subject to the three months time limit set out in s. 123(1)(a) Equality Act 2010, the application of which requires the claims in this case to be issued by 7 December 2019. The EC certificate having been filed on 16 December 2019 means it was filed 9 days beyond the time limit.
24. The Tribunal does not consider it relevant to this decision that the Grounds of Claim were not filed until 15 March 2020, the question for the Tribunal is in relation to the date that the claim was accepted. Consideration was therefore given to the reasons why the claim was delayed between 7 December 2019 (the statutory time limit) and 16 December 2019 when the claim complied with the requirements of rule 12 ET Rules.
25. The provisions of s.123(1)(b) requires the tribunal to consider whether an extension to the time limit would be just and equitable in all the circumstances.
26. The Claimant's evidence showed her reliance upon her adviser at the time to file the ET1. She believed him to be an experienced adviser in the area of discrimination claims. The Claimant relied upon the adviser who did not provide her with the details of the time limits or the requirement for EC registration. He did not provide her with a sufficiently competent service to meet all the requirements of rule 10 ET Rules. Whilst she was aware at the time the ET1 was filed that he had not included all the detail which he had indicated that he would, she was not aware of his omission in respect of the EC certificate until she contacted the Tribunal on 5 December 2019 to chase them for confirmation of a case number.
27. The issue of the lack of EC certificate number was corrected by the Claimant on 16 December 2019, some eleven days after she was made aware of the rejection. This was the only basis upon which the tribunal sought to reject the claim. A valid claim was therefore made on 16 December 2019, as indicated by the tribunal's letter sent on 27 December 2019. This Tribunal therefore

does not consider any preliminary issue in relation to whether the failure to provide an EC certificate number renders the claim invalid, as that has been resolved. It is relevant only to the extent that it provides the date on which a valid claim was made to the ET under the rules set out in *Adams v British Telecommunications plc* [2017] ICR 382, EAT.

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28. The issue for this Tribunal is to consider whether it is just and equitable to extend time by the 9 days beyond the time limit that it took for the claimant to file the EC certificate and to allow the claim to proceed.

29. The Tribunal accepts that the Claimant challenged her adviser the day after she became aware of the error and also contacted ACAS for advice on how to carry out the relevant process. She applied for her EC certificate the following working day and applied to the ET for reconsideration the following week. The Tribunal considers that the Claimant therefore took appropriate steps within a short period of time to rectify the mistake made by her representative.

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30. The Tribunal takes into consideration the balance of prejudice to the parties in allowing the extension of time. The Tribunal considers that to dismiss the claim would prevent the Claimant from pursuing what may be unlawful action by her former employer. However, to allow the claim to proceed would be to require the Respondent to defend a claim which was filed 9 days late. This is not a claim where it could be said that the delay leads to any uncertainty that a fair trial could still occur and does not place any additional burden or prejudice on the Respondent. The balance of fairness overall therefore lies with the Claimant being allowed to pursue her claim.

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Disability Discrimination claim

31. The content of the Grounds of Claim gave rise to one further consideration for the Tribunal – being the additional disability discrimination claims made in the Grounds of Claim which were not referred to on the ET1 form. The Respondent asserts that this amounts to an application for amendment of the claim to include a claim for disability discrimination. The Claimant submits

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that as the Grounds of Claim are part of the claim, in the same way as the further and better particulars (ordered on 27 March 2020) and hence no application is required.

- 5 32. The Tribunal considered that the addition of a claim with regard to a separate protected characteristic would require an application to amend, but considered that the Tribunal had raised the issue of amendment of its own volition. The Tribunal therefore applied the principles of Selkent in considering the application.
- 10 33. The Tribunal took into account all the circumstances of the case, including the manner in which the claim had come to the attention of the Respondent. The Tribunal considered that the amendment to add a disability discrimination claim arises out of the same facts and time period as the existing race discrimination claims. However it does assert a different protected characteristic and one which will require the Respondent to engage in a
15 different defence than the existing claim.
34. The Tribunal also considered that the detail of the claim for disability discrimination has been provided at the same time as the detail of the race discrimination claim. Whilst the Respondent was already on notice of a race
20 discrimination claim from the ET1, they were not aware until receipt of the Grounds of Claim of a disability claim. However, given that the details were known at the same time, there does not appear to be any distinction to be made as a result of any delay.
- 25 35. The Claimant's reasoning for not drawing the matter to the attention of the Tribunal earlier was due to the lack of professional service from her adviser. The Claimant asserts that the content of the Grounds of Claim were the same as the Grounds which were drafted in November 2019 to accompany the ET1, which she had discussed with her adviser. The Tribunal does not accept this evidence as the ET1 was submitted on 27 November and yet the Grounds of Claim refer at paragraph 73 to correspondence of 28 November 2019.
- 30 36. The Tribunal concludes that these Grounds of Claim were drafted after the ET1 was submitted, hence the reason why the ET1 does not include a tick box for a disability discrimination claim. However, the Tribunal concludes that

the claim for disability discrimination should be allowed to proceed, as there has been no delay to the proceedings by this addition. There is no prejudice to the Respondent in having the claim added at this stage and the prejudice to the Claimant of having her potential claim dismissed outweighs any inconvenience to the Respondent of an additional claim.

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37. The disability discrimination and failure to make reasonable adjustments claims should be allowed to proceed.

Next Steps

- 10 38. This preliminary hearing did not consider the Amended Grounds of Claim which were filed on 24 April 2020. The parties are asked to indicate whether those amendments are agreed, or whether a further PH will be required to consider whether the amendment should be allowed.
- 15 39. Thereafter, a further case management PH will be required to consider directions for the progress of the claim.

Employment Judge: Sally Cowen
Date of Judgment: 26 November 2020
20 Entered in register: 26 November 2020
and copied to parties

- 25 **I confirm that this is my Judgment in the case of Quarcoo v The Scottish Ministers and that I have signed the Judgment by electronic signature.**