



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109828/2021

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Consideration of written submissions on 9 September 2021

Employment Judge M Sangster

10 **Ms J Robertson**

**Claimant
Represented by
Mr S Smith
Solicitor**

15 **B&Q Limited**

**Respondent
Represented by:
Ms Painter
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's application to amend her claim is granted.

REASONS

Background

25 1. The claimant submitted an ET1 on 28 May 2021, claiming discrimination arising from disability (the **ET1**). A case management preliminary hearing took place on 30 July 2021, before Employment Judge MacLean. On the evening of 29 July 2021, by email sent at 22:16, the claimant's representative intimated that the claimant wished to apply to amend the claim. The terms of the proposed amendment to the claim, raising a new complaint of victimisation, were attached to their email (the **Proposed Amendment**).

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2. At the case management preliminary hearing, EJ MacLean ordered that a formal application to amend the claim should be made and that the respondent should have the opportunity to consider this and set out the basis for any

E.T. Z4 (WR)

objection to the application. The parties were directed to confirm if they were agreeable to the Tribunal considering the application to amend, and any objection, by way of written submissions.

3. On 4 August 2021, the claimant's representative provided a written argument
5 in support of the claimant's application to amend the claim which, in summary, covered the following points:
- (i) The Tribunal were referred to the case of **Selkent Bus Company Limited v Moore** 1996 ICR 836, in particular paragraphs 4 & 5 of the Judgment.
 - 10 (ii) It was conceded that the application to amend sought to add two new claims of victimisation, rather than re-labelling facts already pled. It was stated that one arose directly from the same facts as addressed in the ET1, the other arose indirectly from those facts.
 - (iii) In relation to time limits, the amendment application was lodged within
15 the primary time limit for raising claims of this nature.
 - (iv) Whilst a separate claim could have been lodged, it was felt that it was more appropriate to deal with this by way of an amendment to the existing claim, given the overlap in terms of the facts and the personnel involved. It was accepted that the new claims arose from
20 events before the existing claim was lodged. The claimant's position however was that she was unaware that these issues gave rise to distinct claims. It was asserted that the respondent has sufficient time to investigate and respond to the new claims, as the final hearing is scheduled to take place in December 2021.
 - 25 (v) The prejudice to the claimant in not allowing the amendment outweighs any injustice to the respondent.
 - (vi) Finally, the claimant applied to make a further amendment, namely to continue her claim using her maiden name of Morrison.

4. On 17 August 2021, the respondent confirmed they had no objection to the amendment to the claimant's name, but objected to the application to amend to add a claim of victimisation. In summary, the basis for that objection was as follows:

5 (i) The alleged acts took place prior to the submission of the claim on 28 May 2021. No explanation had been provided for why these claims were not included in the original application and why it took until 29 July 2021 for the application to amend to be made.

10 (ii) The respondent should not be prejudiced by the failure to include these claims in the originating application, or a failure to raise these issues in a separate ET1 within the relevant time limits. The claimant would have alternative avenues to seek recompense for any such failure.

15 5. The respondent's representative confirmed in their email of 17 August 2021 that they were content for the matter to be determined by reference to the written submission made.

20 6. On 3 September 2021 the claimant's representative also confirmed that they were content for the application to be determined by reference to the written submissions made. They stated that they were instructed in relation to the claims which formed the basis of the amendment application in the days immediately prior to the submission of the application to amend. They highlighted that the new claim made in the Proposed Amendment was submitted within the relevant time limits.

Relevant law

25 7. Employment Tribunals have a broad discretion to allow amendments at any stage of proceedings, either on the Tribunal's own initiative or on the application by a party. Such a discretion must be exercised in accordance with the overriding objective (which is set out in the Employment Tribunals Rules of Procedure) of dealing with cases fairly and justly. Although various
30 principles apply specifically to the assessment of an application to amend, the

need to comply with the overriding objective underlies the application of those principles.

8. In ***Selkent Bus Company Limited v Moore*** 1996 ICR 836 guidance was given as to how Tribunals should approach applications to amend. The EAT confirmed that any application to amend a claim must be considered in light of the actual proposed amendment, so that the Tribunal may understand and give consideration to the purpose and effect of the amendment. It is important therefore that the application sets out the terms of the proposed amendment in the same degree of detail as would be expected had it formed part of the original claim, to give fair notice to the other party of the case which it is to meet.
9. In approaching the question of whether to allow an application to amend, Tribunals must have regard to all the relevant circumstances and in particular to any injustice or hardship which would result from the amendment or a refusal to allow it (***Cocking v Sandhurst (Stationers) Limited and another*** 1974 ICR 650, NIRC).
10. Accordingly, when determining whether to grant an application to amend Tribunals should carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the levels of hardship that would be caused to the parties by granting or refusing the amendment. In ***Selkent*** the then President of the EAT, Mummery P, explained that relevant factors would include:-
- (i) **Nature of the amendment** - i.e. is the amendment, for example, one involving the correction of clerical or typographical errors, the addition of factual details to existing allegations and or the addition or substitution of other labels for facts already pled? Alternatively, is the amendment one which involves the making of entirely new factual allegations that change the basis of the existing claim? In other words, whether the amendment sought is a minor matter, or a substantial alteration pleading a new cause of action.

- (ii) **Applicability of time limits** – if a new claim or cause of action is proposed to be added by way of amendment, the Tribunal should consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended.
- 5 (iii) **Timing and manner of the application** – an application should not be refused simply because there has been delay in making it, as amendments may be made at any stage of the proceedings. 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
- 10 now being made: for example, the identification of new facts or new information from documents disclosed on discovery.
11. The above is not an exhaustive list. There may be additional factors to consider in any particular case, but the above basic factors should form part of the Tribunal's consideration.
- 15 12. The hardship and injustice test is a balancing exercise. As noted by Lady Smith in *Trimble and another v North Lanarkshire Council and another* EATS0048/12 it is inevitable that each party will point to there being a downside for them if the proposed amendment is allowed or not allowed. It will therefore rarely be enough to look at the downsides or 'prejudices'
- 20 themselves. These need to be put in context, and that is why it is important to look at all the surrounding circumstances.

Discussion & Decision

13. There being no objection to the application to amend the claimant's name, this was granted.
- 25 14. In considering the remainder of the application to amend, the Tribunal considered each of the factors set out in Selkent and reached the conclusions set out below.

Nature of the amendment

15. The claim which the claimant seeks to introduce by way of amendment is that of victimisation. The only complaint in the ET1 was of discrimination arising from disability. The claim of victimisation is that the claimant was subjected to detriments as a result of raising a grievance in January 2021, which
5 included allegations of discrimination. The detriments asserted are:

- (i) That, notwithstanding an agreement with Gary Burns to the contrary, an underpayment of her April 2021 wages was repaid to her on 31 May 2021, resulting in her losing her entitlement to Universal Credit for that month; and
- 10 (ii) A comment made to her by Gary Burns on 11 May 2021.

16. Neither of the asserted detriments were mentioned in the ET1. The grievance which the claimant raised in January 2021 is however key component of the factual matrix asserted in the ET1.

17. The Proposed Amendment is a substantial amendment. It seeks to add an
15 entirely new claim, making new factual allegations and pleading an entirely new cause of action, albeit related to the existing claim.

Applicability of time limits

18. The Proposed Amendment was intimated on 29 July 2021, within 3 months of the acts complained of in the Proposed Amendment, which is within the
20 time limit set out in section 123(1) of the Equality Act 2010.

Timing and manner of the application

19. The Tribunal considered why the application was being made at this stage. The Tribunal noted that the alleged detriments occurred before the ET1 was lodged. The claims ought therefore to have been included in the ET1. The
25 claimant's position is that they were not as she was not aware that these circumstances gave rise to distinct claims and that the Proposed Amendment was lodged within a few days of the claimant's representative being made aware of these additional allegations.

Prejudice

20. The Tribunal considered the prejudice to each party, noting that it is inevitable that each party will point to there being some downside for them if the proposed amendment is allowed or not allowed.

21. The Tribunal noted that, at the case management preliminary hearing held on 30 July 2021, the respondent stated that they intended to lead evidence from Gary Burn at the final hearing. It does not appear to the Tribunal, given the terms of the Proposed Amendment, that if the Proposed Amendment were allowed:

(i) any additional case management would be required;

(ii) the respondent would require to call any additional witnesses; or

(iii) the four days allocated for the final hearing would require to be extended to accommodate evidence in relation to the victimisation claim.

This was certainly not asserted by either party.

22. Whilst the respondent would require to conduct some additional investigation into the issues raised in the Proposed Amendment, if it were granted, this would have been required in any event if the issues raised in the Proposed Amendment had been included in the ET1, or if a separate claim had been lodged on 29 July 2021, rather than an application to amend being made.

There would be ample time for the respondent to do so, prior to the final hearing in December 2021. The Tribunal noted that the only case management order which requires to be complied with in advance of the final hearing is for the parties to agree a joint set of productions and lodge this by 7 December 2021.

23. The Tribunal therefore conclude that the prejudice to the respondent, if the Proposed Amendment is allowed, is minimal.

24. The prejudice to the claimant on the other hand is significant, as she would not be able to pursue her claim of victimisation.

Conclusions re Application to Amend

25. Taking into account the above factors, and considering the balance of hardship and injustice between the parties, the Tribunal conclude that the application to amend the claim to include the claim of victimisation, as detailed in the Proposed Amendment, should be granted. Whilst the victimisation claim ought to have been included in the ET1, it was still raised timeously and the prejudice to the respondent in allowing the amendment is clearly outweighed by that to the claimant if the application were refused.

26. The Tribunal notes that the respondent wishes to respond to the amended claim by amending their response. They should do so within 14 days of the date this Judgment is sent to the parties.

Employment Judge: Mel Sangster
Date of Judgment: 09 September 2021
Entered in register: 15 September 2021
and copied to parties