



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107475/2020

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Open Preliminary Hearing – 15 September 2021 at 10 am by CVP

Employment Judge Campbell

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Ms M Oliver

**Claimant
Represented by:
Ms J Dunnigan**

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B&Q Limited

**Respondent
Represented by:
Mr C Geary, Counsel**

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1. DECISION AND ORDERS

1.1. The claimant's application to amend her claim to include a complaint of age discrimination is granted on the terms set out in the note below;

1.2. The respondent is permitted until **27 October 2021** to amend the response in order to answer the amendments to the claim;

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1.3. The case will be listed for a full hearing by way of date listing letters which will separately be issued to the parties.

2. BACKGROUND

- 2.1. This claim arises out of the claimant's service as an employee of the respondent between the agreed dates of 5 October 2019 and 29 December 2020. The claimant resigned.
- 2.2. The claimant submitted a claim form (ET1) to the tribunal on 25 November 2020, therefore before her resignation. Her claim was stated as 'breach of contract in respect of grievance policy'.
- 2.3. A second claim form was submitted to the tribunal on 23 December 2020. This appeared to be the original ET1 overwritten to add new claims of unfair dismissal and age discrimination.
- 2.4. The respondent submitted a response form (ET3) on 24 December 2020. This answered the original ET1 only.
- 2.5. At a preliminary hearing on 30 April 2021 before Employment Judge Strain, the original claims of breach of contract and unfair dismissal were dismissed on the basis that the tribunal did not have jurisdiction to hear them.
- 2.6. At the same time the Judge scheduled a further preliminary hearing to determine whether the claim of age discrimination contained in the second ET1 should be allowed to proceed to a full hearing as an amendment to the original claim.
- 2.7. The Judge also ordered the claimant to provide further and better particulars of her age discrimination claim (dealt with in detail below). She responded to provide a document containing further details of the proposed claim.
- 2.8. The respondent submitted amended grounds of resistance to the claim on 30 June 2021. The revisions set out the respondent's position on the proposed discrimination claim. It is not clear to me on the information I have whether those have been formally accepted.

2.9. At today's hearing the claimant was represented by her mother, Ms Dunnigan. The respondent was represented by Mr Geary who is a barrister.

2.10. A bundle of documents had been prepared for the purpose of today's hearing.

3. MATTERS ADDRESSED

Identification of the proposed age discrimination claim

3.1. I began by noting that in terms of both the second ET1 form and EJ Strain's note and orders of 30 April 2021, the scope of the claimant's application to amend was confined to a complaint of age discrimination. Ms Dunnigan had included details of a potential claim of sex discrimination in her further particulars, but accepted that those went outside of the scope of the amendment application and so would not form part of the discussion today. She accepted this and considered that there was a large degree of overlap between the two potential types of discrimination claim in any event.

3.2. I asked Ms Dunnigan to describe to me the types of age discrimination complaint the claimant was seeking to make, with reference to the written further particulars she had provided and the specific directions given by EJ Strain, namely:

3.2.1. Whether direct or indirect discrimination is alleged, or both;

3.2.2. The dates and details of the alleged discriminatory acts, and the people involved;

3.2.3. Whether an actual or hypothetical comparator is being relied on;

3.2.4. If indirect discrimination is being alleged, what was the provision, criterion or practice said to put the claimant at a particular disadvantage compared to people not sharing her protected characteristic and how did it in fact put her at a disadvantage; and

3.2.5. If any alleged discriminatory act took place more than three months before the application to amend (i.e. 23 December 2020) then on what basis was it said to be just and equitable for it to be determined despite being submitted out of time.

5 3.3. On that basis the proposed claims were as follows:

10 3.3.1. On 15 September 2020 the claimant was forced into resigning in the course of a disciplinary meeting with a manager, Lorna Macdonald. Ms Macdonald treated her harshly and unfairly in that meeting. She allowed or offered the claimant no support and took advantage of her lack of awareness of employment rights and procedures. This was direct discrimination. In her treatment of the claimant Ms Macdonald took advantage of the claimant's young age (she was 17 at the time) and she would have treated an older employee more favourably. The claimant's comparator is a Ms Zeenat Ashraf, who worked in the same store but in a different department. She was aged in her twenties at the relevant time. She had been asked to attend a similar meeting but was not treated as severely as the claimant and was told she would be given a warning in relation to her attendance – the **first complaint**; and

20 3.3.2. Between 8 and 16 October 2020 the claimant was unfairly treated by a Mr Andrew Young in the way that he dealt with a grievance she raised. He did not consider her grievance properly, including that he widened the discussion to cover other issues outside of the grievance in a way which was critical of the claimant, and did not provide a written outcome of the grievance despite being requested, but instead merely told her she should be happy that she was back at work. Again this was direct discrimination by way of Mr Young taking advantage of her youth and inexperience to treat her less favourably than he would an older employee. The same comparator is relied upon as for the first allegation of discrimination above – the **second complaint**.

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3.4. Ms Dunnigan was content that the discrimination complaints be recorded as above. Giving consideration to whether any claim of indirect discrimination was being put forward, she confirmed that such a complaint would merely be a re-framing of the direct discrimination complaints above.

5 3.5. As such therefore the claim of age discrimination consists of two separate allegations of direct age discrimination which are similar in nature and close together in time.

Respondent's submissions

10 3.6. Having taken things that far on the claimant's side I allowed Mr Geary the opportunity to comment on the claimant's potential discrimination case.

15 3.7. In relation to any claim of indirect discrimination, he recognised that this was not the main focus of the claimant's case but pointed out that in any event the claimant had not addressed the 'PCP' questions in her further particulars, and that generally it was difficult to make out such a complaint from the particulars.

3.8. On the question of whether it was appropriate to allow amendment of the claim Mr Geary acknowledged that the authorities on that subject are well known, and I confirmed there was no need for him to rehearse them. Some of those are referred to directly below.

20 3.9. He made the additional point that by way of the initial claim, the second ET1 and then her further particulars the claimant had taken three attempts to set out her claim and yet still there was a need to be clear on the details.

3.10. He also invited me to find that the new claims appear to be without merit, and this is a factor I should take into account.

25 3.11. He separately raised that the first discriminatory act fell more than three months before the date when the application to amend was deemed to have been made, and so was out of time. There was therefore even greater justification in refusing to allow it to proceed.

3.12. Mr Geary also raised that the claimant had not given an explanation as to why the discrimination complaints had not been made on time.

3.13. He concluded by emphasising that the respondent had incurred additional costs above those it would normally have expected as a result of the way the claimant had pursued her claim so far.

Claimant's response

3.14. Briefly in response to Mr Geary's submissions, Ms Dunnigan acknowledged that she had not initially identified on her daughter's behalf that the situations she had considered were examples of unreasonable conduct or treatment on the respondent's part could be framed as a discrimination claim. She was not legally qualified.

Consideration of the application

3.15. I reserved my judgment on the application in order to give it full consideration.

3.16. In doing so I considered the tribunal's overriding objective as stated in rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as well as the authorities of ***Selkent Bus Company Limited v Moore [1996] ICR 836*** and ***Cocking v Sandhurst (Stationers) Limited [1974] ICR 650***.

3.17. Rule 2 of the tribunal rules requires me to deal with the claim fairly and justly, including:

3.17.1. Ensuring that the parties are on an equal footing;

3.17.2. Dealing with the case proportionately to the complexity and importance of the issues;

3.17.3. Avoiding unnecessary formality and being flexible;

3.17.4. Avoiding delay, provided there is proper consideration of the issues; and

3.17.5. Saving expense.

3.18. I note the guidance given in **Cocking** to 'have regard to all the circumstances of the case', and in particular to consider the extent of any hardship caused to either party by the decision to allow the amendment, or not.

5 3.19. According to **Selkent**, the relevant circumstances can include:

3.19.1. **the nature of the amendment** – whether it involves the correction of a minor error, or makes completely new allegations and claims, or where it sits in between;

10 3.19.2. **the applicability of time limits** – if the amendment is allowed will it introduce a claim which is out of time, and if so should the relevant time limit be extended; and

15 3.19.3. **the timing and manner of the application** – delay will generally count against the party making the application, but it is ultimately a discretionary factor. Any reasons given why the application, or the claim itself, was not made earlier should be considered.

3.20. I noted that the discrimination claim is now clearly defined and should not be inordinately difficult or costly for the respondent to investigate and respond to it.

20 3.21. I also observed that the discrimination claim arises out of the same facts as the original claim. Whilst it is perhaps not merely a re-labelling exercise, the respondent will have considered the events complained of in the context of the original claim.

25 3.22. I also considered it relevant that if the second ET1 had been treated as a fresh claim rather than an amendment to the original claim, it would have had the effect of presenting at least part of the discrimination claim on time, namely the second complaint. Although the first complaint would still have been out of time, the two complaints are factually similar and close together in time. The comparator in each is the same. The extent of extra enquiry and preparation involved for the respondent in dealing with the first should be minimal in addition to what would be required for the second. I therefore
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tended towards the view that it was just and equitable to allow the second complaint to proceed and, by extension, the first also.

5 3.23. It was also relevant in taking the above view that it has been held by the EAT that it is not necessary for a claimant to go through ACAS Early Conciliation for a complaint which they wish to add to a claim already raised. As such the claimant in this case would not be circumventing a necessary process were the amendment to be allowed.

10 3.24. Although I had sympathy for Mr Geary in relation to the amount of time it has taken to get to the point of identifying a clearly delineated complaint, there should be no reason why the claim cannot now proceed to a full hearing on a clearly defined set of issues and factual matters.

15 3.25. I was not able to say that the complaints had little prospect of success, particularly bearing in mind the guidance of the EAT in ***Mechkarov v Citibank NA [2016] ICR 1121***. Although that case dealt with strike out rather than amendment, the principles are nevertheless relevant, which I take to be, in summary:

3.25.1. Only in the most clear-cut cases should a discrimination claim be disallowed;

20 3.25.2. If there are key issues which turn on oral evidence, they should not be decided before that evidence is heard;

3.25.3. The claimant's case should be tested at its highest;

3.25.4. If, however, that case is still deemed to be disproved, or totally and inexplicably inconsistent, then it may well be struck out; and

25 3.25.5. A tribunal should not be drawn into a min-trial of oral evidence in order to try to decide the core facts at the preliminary stage.

3.26. The above principles and considerations led me to decide that the amendment application should be allowed to the extent that a claim of direct age discrimination, consisting of the two complaints set out at

paragraph 3.3 above, should form part of the claimant's claim by way of amendment and be allowed to proceed to a full hearing.

5 3.27. The respondent is therefore permitted to amend the response to the claim in order to reply to those complaints as ordered above. This will allow any previous amendment to be formalised if necessary in addition to further pleadings dealing with the complaints as they are now described.

3.28. Thereafter the claim can be listed for a full hearing in the usual way. It is presumed that the parties will be able to participate again by way of CVP.

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Employment Judge: Brian Campbell
Date of Judgment: 29 September 2021
Entered in register: 04 October 2021
and copied to parties

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