EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108777/2021

Open Preliminary Hearing Held by Cloud Video Platform (CVP) on 16 September 2021

Employment Judge: Russell Bradley

Thomas McGartland	**Claimant** **In person**
Turner Access Limited	**Respondent** **Ms P Hughes** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's application to amend his claim by the addition of a claim; for one week's pay; for one week's "*lying time*"; and a claim for training costs in respect of the Construction Industry Scaffolders Record Scheme is refused.

REASONS

Introduction

1. In an ET1 presented on 29 March 2021 the claimant made a claim of unfair dismissal and for notice and holiday pay. He had worked for the respondent as a scaffolder. On 29 April 2021 the respondent lodged an ET3 form. It set out its resistance to the claims. On the claim of unfair dismissal it said that the claimant did not have the requisite service to maintain it. In an email dated 26 July 2021 the claimant accepted that he cannot make that claim. It will not proceed to a final hearing.

2. In that email of 26 July he also said, "*As stated before I seek my week's wage basic before tax £480 also my week lie time as well as the 11 days holiday I'm still due*." On 29 July, the claimant presented a second ET1 form. In it, he made claims for notice pay, holiday pay, arrears of pay and other payments. The form then specified that he was claiming training costs as his Construction Industry Scaffolders Record Scheme (CISRS) card had expired and he asserted that the respondent was responsible for keeping his training up to date.

3. In an email of 2 August and in answer to a question posed by a legal officer who had reviewed the ET1 of 29 July and its accompanying emails, the claimant indicated his wish to amend his claim "*for the lack of care of duty received by*" the respondent during his employment for his CISRS card renewal. The claimant indicated that he may need to undertake "*a full course*" which could cost £1300 plus expenses. By letter dated 11 August, solicitors for the respondent opposed the claimant's application to amend his claim.

4. This preliminary hearing was fixed by Notice to determine the claimant's application to amend the claim and the respondent's objection to it.

5. Prior to discussing the claims and the purpose of the hearing, I drew to parties' attention the fact of my previous instruction as counsel by Ms Hughes' employer for clients of that practice in employment tribunal hearings. I noted

that the last occasion of an instruction was in October 2019. Neither party had an objection to me determining the issues at this hearing.

6. No bundle (or file) was lodged for this hearing. I determined the issues having considered; the ET1 and ET3 forms; the claimant's application to amend and the respondent's reply; and the oral evidence.

7. The hearing was disjointed by virtue of a number of short adjournments which resulted from a poor connection at the claimant's location which for the most part was outdoors. Ultimately they did not materially affect the consideration of the issues.

The issues

8. The issue for determination was whether the claimant should be allowed to amend his application by including claims for one week's pay; for one week's "*lying time*"; and a claim in respect of training costs in respect of the Construction Industry Scaffolders Record Scheme.

Evidence

9. I heard evidence from the claimant and from James Bowers, also a former employee of the respondent.

Findings in Fact

10. From the evidence and the Tribunal forms, I found the following facts admitted or proved.

11. The claimant is Thomas Gorman McGartland. Between about 19 November 2019 and about 18 January 2021 he was employed by the respondent as a scaffolder.

12. At the start of his employment the claimant worked a week's "*lying time*." His understanding of that method of payment was that in his first week he received no pay; in his second week he received pay due for week one; and so on until the end of the contract. His understanding from November 2019 was that in

the event of the ending of the contract the week's pay for "*lying time*" would be paid to him, always subject to any deductions properly due to the respondent.

13. As a scaffolder, it is necessary for the claimant to have a CISRS card. It is a requirement of the Construction Industry Training Board (CITB). At or about the beginning of his employment with the respondent the claimant was told by John Fisher, the respondent's then scaffolding supervisor, that any training required of him to retain the card would be provided by the respondent. Other scaffolders, including Mr Bowers, were party to that discussion. The claimant understood that it would be honoured by the respondent as a "*gentleman's agreement*."

14. In or about July 2020 the claimant's CISRS card expired. At the time, the respondent was aware of the fact. The claimant complained many times by telephone to John Fisher requesting that the respondent honour its commitment to ensure that he underwent the necessary training so as to renew it. As a result of the pandemic, a grace period for card renewals was put in place. Despite this, the respondent did not arrange for the claimant to undergo the training that was necessary for him to renew his CISRS card. As a result, he is no longer able to work as a scaffolder, at least until he has undertaken the required training.

15. On Monday 18 January, the claimant was on site at work. He received a telephone call to say that he was being paid off. At about that time he contacted a secretary employed by the respondent, Kelly McGeachy. He asked her about monies owed to him. She advised him that all payments had been finalised.

16. The claimant's claim for an additional week's pay, for the week's lying time and for training costs were not included in his first ET1.

17. Very shortly after his dismissal the claimant contacted ACAS. He did so with assistance from his partner. On 28 January 2021 early conciliation began. The certificate was issued the next day, 29 January. At about that time the claimant was party to emails with ACAS. He was aware from them that he was required to get his ET1 presented by a certain date.

18. The claimant was unaware that he was required to include all claims that he intended to pursue in the employment tribunal in his first ET1 form. The reason why his claims for a week's pay, for lying time and for CISRS training costs were not included in his first ET1 form was lack of knowledge and inexperience on his part. He believed and expected that he would be able to argue for all of the claims that he believes he has at a final hearing.

Comment on the evidence

19. The claimant's evidence was credible and reliable. His credibility on the question of the respondent's commitment to CISRS training was enhanced by (i) his ability to recall detail of those who had witnessed the conversation and (ii) the fact that the commitment was in his experience of the industry, unusual. He was (to his credit) candid and clear as to why the claims he sought to include by amendment had not been included in his first ET1.

20. Mr Bowers' evidence was of limited value on the issues for determination. But he credibly corroborated the claimant's evidence on the respondent's commitment to CISRS training.

Submissions

21. By agreement, Ms Hughes' submission came first. This allowed the claimant the opportunity to reply having heard the basis of the respondent's opposition to his application.

22. Under reference to the decisions in ***Selkent Bus Co. Ltd. v Moore*** [1996] ICR 836 and ***Cocking v Sandhurst (Stationers) Ltd*** [1974] ICR 650, N.I.R.C. Ms Hughes highlighted three factors. First, the nature of the claimant's amendment which she categorised as seeking to introduce an entirely new factual basis of claim not linked to the existing claims. Second, time limits of which she said the claimant fell foul as even with early conciliation this application was outwith the normal "*three month*" rule. And third, the timing and manner of the application on which she said the claimant had offered no explanation for the delay and in particular it was not until July 2021 that he sought to introduce these claims. Separately, she argued that a relevant factor

was that the claim for training costs did not have a relevant legal basis and thus had no reasonable prospects of success.

23. The claimant (as he had said in evidence) explained that the reason why he was seeking leave to "*amend in*" these claims was down to his inexperience and lack of knowledge. He had relied on help from his partner. He did not know that his claims required to be as detailed in writing as had turned out to be the case. Put shortly, his position was that if he had been asked to provide the detail that he ultimately did, he would have done so. His hope was that (as he put it) he would not be "*crucified through his own stupidity*".

The law

24. "There is no specific provision in the Employment Tribunals Rules of Procedures 2013 (as amended) which governs amendments, but the Employment Tribunal is required by rule 2 to seek to give effect to the overriding objective of dealing with the case fairly and justly." (***Pontoon (Europe) Ltd v Sinh*** UKEAT/0094/18/LA UKEAT/0213/18/LA. The decision of the EAT in ***Selkent*** (cited by the respondent) contains general guidance to employment tribunals in relation to amendments (recognised as such in the Court of Appeal in ***Ali v. Office of National Statistics*** [2005] IRLR 201). I refer to that guidance below.

25. Section 23(2) of the Employment Rights Act 1996 provides that an "*employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with— (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received*." The caveat is section 23(4) which provides that "*Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."*

Discussion and decision

26. It is convenient to set out the guidance from the EAT in ***Selkent***.

"Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant. (a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action. (b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978. (c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time — before, at, even after the hearing of the case. 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 now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

27. In this case, I agree with the respondent that the claimant seeks to make entirely new factual allegations which change the basis of the existing claim by adding new claims. The first ET1 specified his claims as being unfair dismissal and for notice and holiday pay. He was clearly aware at that time of the claims that he now seeks to introduce. They are distinct and rely on proving facts different from the original claim. Further, the timing of this application makes them, on their face, out of time. The claimant was, much to his credit, candid open and honest about what advice he had taken at the time of early conciliation and what he believed he would be able to do at a final hearing. He was also candid and honest that he did not include these claims at the time of the first ET1 because he had made a mistake. It was down to his lack of knowledge and inexperience on his part. In my view that does not satisfy the test of *"reasonable practicability*". In my view it does not permit a conclusion that the time limit should be extended under the relevant applicable statutory provision.

28. On the question of relative hardship and injustice on the "*lying time*" claim and a week's pay, the issue is finely balanced. On the one hand the claimant would lose the claim. On the other, the respondent would require to answer the claim in writing. There would be a separate (albeit probably quite short) enquiry into new facts. The prevailing factor in refusing the amendment is that it is out of time and I am not satisfied that it was not reasonably practicable for it to have been included in the first ET1.

29. On the issue of training costs the issue is clearer. Not only is it out of time; I am not satisfied that it was not reasonably practicable for it to have been included in the first ET1; it was an issue which was of some importance to the claimant and he was aware that it was an issue for several months prior to his dismissal. But separately, the claim does not have reasonable prospects of success. Two related factors are relevant. First, there is not (on the material available) an enforceable obligation against the respondent. Ordinarily the commitment would have been included in a written statement of terms or contract, and in this case it was not. The claimant's evidence was that it was a "*gentleman's agreement*" and no more. Second, the claimant was not clear

on what sum was due by the respondent. On his written case that sum could be either £1300 or £350. That lack of clarity reinforced my view that there was no enforceable obligation against the respondent.

30. For these reasons, the claimant's application to amend his claim is refused.

31. The case should be listed for a final hearing on the remaining claims.

Employment Judge: Russell Bradley
Date of Judgment: 04 October 2021
Entered in register: 11 October 2021
and copied to parties