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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101441/2020

Held on 12 October 2021

Preliminary Hearing held by Telephone Conference Call

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Employment Judge: R Gall

Ms A Canaj

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**Claimant
Represented by:
B Kadirgolam
Solicitor**

Atalian Servest Limited

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**Respondent
Represented by:
Ms Z Stonehouse
HR Business Partner**

JUDGMENT FOLLOWING PRELIMINARY HEARING

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The Judgment of the Tribunal is that the application to amend the claim made on 13 September 2021 is refused. The claim is therefore at an end.

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REASONS

- 1 This Preliminary Hearing (“PH”) was conducted by telephone conference call
on 12 October 2021. Mr Kadirgolam participated for the claimant. Ms
Stonehouse participated for the respondents.
- 5 2 The PH was set down to determine whether or not an amendment to the claim
would be permitted. The claimant’s application to amend was opposed. The
respondents had set out their opposition to the application as an attachment
to an email of 21 September. I had the advantage of having read the
application to amend and the opposition to it, as well as having considered
10 the file, prior to the PH. It was very helpful to have had this opportunity as I
was familiar with the basis of the application and opposition.
- 3 I heard from Mr Kadirgolam in support of the amendment application and then
from Ms Stonehouse in opposition to it. Mr Kadirgolam was then given the
opportunity to reply to the opposition. The PH then adjourned for 20 minutes
15 or thereabouts while I considered the application and opposition. It then
reconvened and I informed the representatives of my decision on the
application and the reasons for reaching that decision. This Judgment reflects
the reasons given orally.
- 4 The claimant seeks to amend the claim to include a claim in terms of Section
20 15 of the Equality Act 2010. If permitted that would be the sole ground of
claim. Other elements originally in the claim are at an end following the view
taken by a fellow Employment Judge that there had not been substantial
compliance with an Unless Order.
- 5 The principles detailed in *Selkent Bus Co Ltd v Moore* 1996 ICR 836 apply to
25 an amendment application. Both parties relied on those principles. They
involve consideration of the nature of the amendment, its timing and the
prejudice, injustice and hardship which would be involved if the amendment
is allowed on the one hand or is refused on the other. Regard requires to be
had to all the circumstances of the case. The Tribunal has an exercise of

discretion to carry out in considering an application to amend. The interests of justice require to be at the heart of the thinking of the Tribunal.

6 The amendment sought in this case is not a simple relabelling of facts already
pled. It is accepted that it concerns events at time of the dismissal of the
5 claimant. Dismissal is already referred to in the claim in relation to the
elements of claim no longer proceeding. The claim centered around dismissal
and so that matter has been always been part of the basis of the claim. The
proposed amendment does not contain an allegation of a new incident of
discrimination. It is a revised and different set of facts as to what is said to
10 have happened in the dismissal meeting, however, when considered against
the version pled prior to the amendment being presented.

7 The claimant's role was that of a supervisor of cleaning. In the claim form the
claimant says she was told after 6 days of work that she was too strict. She
says that she was informed that this was as she called staff back into the
15 rooms which were regarded by her as not being up to the standards of
cleanliness required. She also says, paraphrasing it, that her job as a
supervisor involved ensuring that appropriate standards of cleaning were met.
That was the purpose of a supervisor. She said in the claim form that the
reason for termination of her employment given to her was an absurd reason,
20 so discrimination must have lain behind the decision to end her employment
after 6 days. The reason given to her had no proper foundation in her view
and led her to conclude that discrimination had occurred.

8 The claim form was presented on 13 March 2020. The claimant has had legal
representation throughout, although there was a change of representation to
25 her present agents around August 2020.

9 There have been procedural steps in the case. There have been 4 case
management PHs at which further specification of the claim has been sought.

10 The claimant provided further details of her claim at times prior to the
application to amend. She stated, for example, that she was told the

respondents were not happy with her performance. This issue with performance was, she said, due to her disability. This was on 16 March 2021.

11 In April 2021 she said that she was told that, as supervisor, she did not need
to check the rooms which had been cleaned. She did check as she had
5 forgotten the instruction due to her disability, she said. Her dismissal had
resulted.

12 In response to the Unless Order she said that she had been told not to “return
the staff to rooms for cleaning” but forgot due to her mental health. It was said
that the dismitter said “*How many times I told you not to return staff*” (sic).
10 This suggests she was potentially dismissed for not adhering to an
order/instruction.

13 The amendment sets out her position as being that that she forgot the
instruction not to call staff back to a room. Calling staff back to a room was
the reason she was dismissed. She forgot the instruction not to do that due to
15 a mental health impairment, it is said.

14 The claimant has very difficult and unfortunate background. She has a
traumatic past. The respondents accept that at the relevant time she was
disabled in terms of the Equality Act 2010.

15 I considered the passage of time since the claim commenced (having been
20 presented on 13 March 2020) and the time of the application to amend being
intimated (13 September 2021). If presented on the latter date, the claim
would be well out of time. That is not conclusive, however. There was no
prejudice said to exist purely through passage of time. The events at time of
dismissal have been at the heart of the claim since it was presented. The
25 respondents have therefore had the opportunity to obtain relevant evidence
about the dismissal. It was not said, for example, that there was any issue in
gathering of evidence about the allegation in the proposed amendment due
to the passage of time.

16 I recognised that there would be prejudice to the respondents if the
30 amendment was permitted to proceed. The claim is currently at an end in that

the other grounds of claim have been dismissed due to non-compliance with an Unless Order. The respondents would face a claim if amendment was permitted. There would be consequent expense and risk of an award against them.

5 17 If the amendment was not permitted, the claim would be at an end. The claimant would be denied the right of action in respect of a claim of discrimination. There would be undoubted prejudice to the claimant in that situation in that she would have no claim.

18 In my view the balance on this point favoured the claimant given the absence
10 of ability to claim if the amendment was not permitted.

19 I turned to consider the nature of the amendment. I was very conscious of what I regarded as a significant change in the claimant's position as set out in the claim form as against her position in the proposed amendment.

20 In the claim form, the claimant was describing a situation where the position
15 of the respondents that she should not be checking cleaned rooms or sending staff back there was something "out of the blue". It did not make sense and sat ill against her role as supervisor, she said. It was, as she described it, "absurd". In the lead up to the proposed amendment, however, her position was that the respondents said they had told her countless times not to check
20 cleaned rooms and send staff back to rooms, but that she had checked them and sent staff back. This was, she said, due to having forgotten the instruction given to her. In the proposed amendment she again states that she forgot the instruction not to call staff back to rooms. She goes on to say that the reason she forgot the instruction was because of her disability.

25 21 Taken with the other changes in position in response to previous requests for further and better particulars I found that the nature of the amendment, with its changed basis of case brought, resulted in it not being in the interests of justice for the amendment to be permitted. I kept in mind that the claimant had been professionally represented throughout the lifetime of the claim. The
30 claim has been current for some time. I refer earlier to the various case

management PHs which have taken place. I had a real concern that the claimant had refined her position and, to an extent at least, tailored it to map out a claim which detailed the elements required for a Section 15 claim. This was only done after specific clarification of the constituent elements of such a claim had been discussed at case management PHs.

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22 As I explained to parties, I had a degree of hesitation in exercising my discretion by concluding that the application to amend would be refused. I was very conscious that it would bring the claim to an end. I was also conscious that this is a discrimination claim. There is a public interest in such claims proceeding. A further factor was genuine sympathy and concern for the claimant given her very traumatic and difficult past. I found the decision an anxious one and one of fine balance.

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23 The factors which ultimately persuaded me to the view to which I came were the new allegations now sought to be made as to the events at dismissal, those events being described as being different to what had been the basis of claim at time of presentation in March 2020. I was not persuaded that there was a good reason for the apparent contradictory version and for the delay, particularly when the claimant was legally represented throughout.

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24 I express no view as to the merits of the claim, whether as initially presented or as now potentially set out. I should record that the respondents do not accept that they knew of the claimant's disability or that discriminatory conduct occurred.

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25 I am grateful to Mr Kadirgolam and Ms Stonehouse for their submissions and for their co-operation in permitting time for reflection and consideration during the adjournment between submissions and the decision being made known.

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Employment Judge: Robert Gall
Date of Judgment: 12 October 2021
Entered in register: 18 October 2021
and copied to parties

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