EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109283/2021 (P)

Held on 18 October 2021

Employment Judge N M Hosie

Mr A Leslie	**Claimant** **In Person**
Metrol Technology Ltd	**Respondent** **Represented by** **Ms T Walker,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's application to amend is refused.

REASONS

Introduction

1. The claimant's employment with the respondent ended on 22 January 2021. On 26 April 2021, he submitted a claim form to the Tribunal in which he claimed that his redundancy payment had been miscalculated and that he was due holiday pay and wages. He alleged he was, *"due the sum of about £50,000 to £100,000"*. I conducted a preliminary hearing to consider case

management on 5 July 2021. The Note which I issued following that hearing is referred to for its terms.

Claimant's application to amend

2. The claimant sent an e-mail to the Tribunal on 1 July 2021 at 13:14 in which he said this:-

"*Yesterday during my job search position it came to my attention that looked remarkably like my role at Metrol. I phoned the recruiter and he informed me that it was Metrol seeking a Field Engineer.*

My job is being advertised 5 months after I have been made redundant. I was made redundant on Jan 22nd as Metrol said 'we anticipate no significant improvements in the next 12 months'.

As I have previously said, Oil and Gas is not spontaneous as contracts are arranged well in advance. I have highlighted parts that particular irk me."

3. By e-mail on 15 July 2021 at 18:43 the claimant applied to amend his claim by adding an unfair dismissal complaint. He attached to his e-mail an amended claim form. At para.8.1 he ticked the box to indicate that he wished to bring a complaint of unfair dismissal. At para.8.2 he added the following averments:-

"*I believe I was made redundant illegally as part of a sham redundancy. My final day at Metrol before being terminated was January 22nd, 2020* (sic) *it is my understanding that Metrol carried out the redundancies as a way of getting staff to sign new contracts. It also allows them to not have to pay the salaries of some of their field engineers during times of low activity. I believe I have premeditorily been selected for redundancy as I would have been unwilling to sign the new harsher terms and conditions of employment.*" At par.9.2 he also added to his originating claim form the following averments: "*I am also seeking damages for being unlawfully made redundant*".

Respondent's response

4. The claimant's application to amend was opposed. The respondent's solicitor attached to her e-mail of 1 September 2021 at 09:41 her submissions in this regard. She referred to the three-month time limit for presenting unfair dismissal complaints and submitted that, "*the amendment application was not submitted to the Tribunal until 15 July 2021, more than 7 weeks after the expiry of the applicable time limit*". Further, there was no explanation from the claimant as to why it was not *"reasonably practicable"* to submit his unfair dismissal complaint in time.

5. The respondent's solicitor then went on in her submissions to say this:-

"*The claimant was made redundant alongside many of his colleagues. The recent requirement for the respondent to hire extra staff on short-term contracts has recently arisen due to an unexpected burden of staff having to quarantine. As such, some former staff members have been re-hired. Indeed, in his e-mail to the Tribunal dated 28 June 2021 the claimant states 'I myself was approached by recruiters. He told me that Metrol were looking for Field Engineers and because I used to work there he asked me if I would like to put my C.V. forward. I declined and I was not amused by it.' The amended ET1 makes no reference to the claimant's unfair dismissal claim being linked to the fact that some former colleagues were re-hired. Indeed, the requirement to re-hire Field Engineers on short-term contracts was not known at the time the decision was made to make the claimant redundant (October 2020) nor was it known at the time when the claimant's employment came to an end (January 2021) after his notice period had expired. In deciding whether the dismissal was fair or not, the Tribunal can only consider what was known to the respondent at the time of dismissal. There was no prospect of a suitable alternative job (either long-term or short-term) when the claimant's employment was terminated. Indeed, the claimant does not suggest that the respondent recruited anyone else into a role the same or similar to his at the time he was dismissed. There is only a reference to an unspecified advert for a (temporary) post that was placed many months later which, we would submit, is irrelevant to the circumstances/situation that existed when the claimant was dismissed.*"

6. The respondent's solicitor then went on to make reference to the guidance on amendment applications in ***Selkent Bus Co. Ltd v. Moore*** [1996] ICR 836 EAT.

7. She also submitted that the nature of the proposed late amendment is "*unspecific*" and that, "*a full redundancy process was followed"*.

8. She further submitted that the two cases referred to by the claimant in support of his application namely ***Simpson*** and ***Withington*** were not in point.

9. The respondent's solicitor reminded me that at the case management preliminary hearing on 5 July the claimant advised that he was not pursuing a claim of unfair dismissal, despite the fact that he knew that others were being approached to be re-hired on a temporary basis in mid-June. His application was submitted, "*more than a month after he was aware that others had been re-hired on a temporary basis*".

10. The respondent's solicitor submitted, therefore, that, "*even if the fact that some colleagues were subsequently re-hired into temporary positions to cover those having to quarantine is relevant (which the respondent denies*) *the unfair dismissal claim has still not been presented, 'within such period as could be considered reasonable*'.

11. Further, with reference to ***Remploy Ltd v. Abbott & Others*** UKEAT/0405/14, the respondent's solicitor submitted that, "*the purported new unfair dismissal claim also lacks proper specification…….it is not at all clear on what basis the claimant now alleges the redundancy situation was a 'sham'? Considering that a large proportion of the workforce had been placed on furlough for many months prior to the proposal to make redundancies, and the claimant did not dispute the need to make headcount reductions at the time (when permitted an opportunity to do so) the 'sham' allegations seem to be entirely lacking in substance/details/logic.*"

12. Finally, the respondent's solicitor submitted that if the amendment application was to be allowed there would be further delay and expense the majority of which, "*would be likely to be borne by the respondent.*"

13. Finally, the respondent's solicitor submitted that it would not be in the interests of justice nor in accordance with the "overriding objective" in the Rules of Procedure to allow the amendment application.

Claimant's response

14. The claimant responded to the respondent's submissions by e-mail on 2 September 2021 at 11:18. While he accepted he did advise at the case management preliminary hearing on 5 July that it was not his intention to claim unfair dismissal, he claimed that he had written to the Tribunal on 28 June stating that he believed that he had been unfairly dismissed.

15. He also claimed that he had objected to the redundancy selection or scoring process at the time. He "*found the process very unfair and strongly objected to the fact that my scoring was changed after it had been issued to me. I highlighted that the response from Metrol was at best highly improbable and at worst showed clearly that the scoring could be easily manipulated to achieve the desired outcome.*"

16. Finally, he submitted that at the case management preliminary hearing, "*it was acknowledged that I have had no legal advice and some allowances would be made from a lack of experience in legal matters.*"

Claimant's further submissions

17. By e-mail on 12 October 2020 at 18:50, the claimant sent to the Tribunal an advert for permanent positions at Metrol. The respondent's solicitor replied by e-mail the same day at 19:09. She submitted that this was irrelevant as the advert was 12 months after the decision was made to make the claimant's role redundant.

Discussion and decision

18. In ***Cocking v. Sandhurst (Stationers) Ltd & Another*** [1974] ICR 650 at 657B, Sir John Donaldson, when delivering the Judgment of the NRIC, laid down a general procedure for Tribunals to follow when considering amendments:-

"*In deciding whether or not to exercise their discretion to allow an amendment, the Tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused.*"

19. These guidelines have been approved in several subsequent cases and were re-stated in ***Selkent***, to which I was referred by the respondent's solicitor. In that case, the EAT emphasised that the Tribunal, in determining whether to grant an application to amend, must carry out a careful balancing exercise of the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to parties by granting or refusing the amendment. Useful guidance on the issue was also given by the EAT in ***Argyll & Clyde Health Board v. Foulds & Others*** UKEATS/009/06/RN and ***Transport & General Workers' Union v. Safeway Stores Ltd*** UKEAT/0092/07/LA. In both cases, the EAT referred, with approval, to the terms of paragraph 311.03 in section P1 of Harvey on Industrial Relations and Employment Law:-

"***b) Altering Existing Claims and New Claims [311.03]***

A distinction may be drawn between : -

(i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint;
(ii) amendments which add or substitute a new cause of action which is linked to, or arises out of the same facts, as the original claim; and
(iii) amendments which add or substitute a wholly or new cause of action which is not connected to the original at all."

20. Valuable guidance was also provided by Mummery LJ at pages 843 and 844 in ***Selkent***:-

"*(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice of granting the amendment against the injustice and hardship of refusing it.*

(5) 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 many different kinds ranging, on the one hand from the correction of clerical and typing errors, additions of factual details to existing allegations and the addition or substituting a further label for facts already pleaded to, to the other hand, making of entirely factual allegations which changed the basis of the existing claims. 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 could be extended under the applicable statutory provisions e.g. in the case of unfair dismissal s. 67 of the Employment Protection (Consolidation) Act 1978.

(c) The timing and the manner of the application

An application should not be refused wholly 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 and information appearing from documents disclosed on discovery. Whenever taking factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting amendments. Questions of delay, as a result of adjournment and additional costs particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

21. When considering the issue I also had regard to the guidance of the EAT in the recent case of ***Vaughan v. Modality Partnership*** UKEAT/0147/20/BA.

Present case

Nature of the amendment

22. The unfair dismissal claim is a new cause of action. It is a new claim. It is a substantial alteration. As I understand the claimant's position, it was only advanced after he became aware that the respondent had advertised that it had vacancies for the job which he did when he was employed by the respondent. However, the advert appeared some five months after the claimant's employment ended and for the purposes of considering whether or not an employer has acted reasonably in dismissing an employee, having regard to s.98(4) of the Employment Rights Act 1996 it is only the respondent's knowledge at the time of dismissal which is relevant. The unfair dismissal claim is now being advanced, therefore, with the benefit of hindsight.

The applicability of time limits

23. The application to amend is out of time, by some 7 weeks, as the respondent's solicitor submitted.

24. So far as extending the time limit is concerned, I do not believe that the cogency of any evidence will be adversely affected by the delay. However, while the claimant is unrepresented he appears well able to articulate his claims and I was also mindful of the guidance of the EAT in ***Chandhok v. Tirkey*** [2015] ICR 527:-

"*The claim, as set out in the ET1 is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013 the claim as set out in the ET1.*"

25. I was also mindful that the burden is on the claimant and that the exercise of discretion to extend the time limit is the exception not the rule (***Bexley Community Centre (t/a Leisure Link) v. Robertson*** [2003] EWCA Civ576). I accept the submissions by the respondent's solicitor that the claimant had provided no vital evidence as to why it had not been *"reasonably practicable"* to submit the unfair dismissal claim in time. There was no apparent impediment to him doing and indeed he maintained that he had previously maintained that his dismissal was unfair. Had I just been required to determine the time-bar issue in isolation, therefore, I would not have exercised my discretion extended the time limit. However, for the purposes of considering an application to amend, time bar is not determinative, as Mummery LJ said in ***Selkent***. It is but a factor to be considered, in the round, albeit an important one.

The timing and the manner of the application/prejudice and hardship

26. Although some allowance requires to be made for the fact that the claimant is unrepresented, as I recorded above it is clear that he is well able to articulate his claim. Nor was there anything to suggest that he was unable to access the internet where guidance can be found readily on the conduct of employment tribunal cases and there is information about time limits. He also maintained that he had previously alleged that he had been unfairly dismissed. As I understand it, he became aware of the respondent's advert in mid-June and yet it was not until 15 July that he submitted his application to amend. That in itself was an unreasonable delay.

27. Further, I found favour with the submissions by the respondent's solicitor that the averments in the purported new claim form are insufficient to support an unfair dismissal claim. Further specification would be required.

28. If I were to allow the amendment further case management procedures would be required, there would be delay and the final hearing would be lengthier.

This would involve additional expense for the respondent and it is uncertain whethert they would be able to recover these expenses from the claimant even if they are able to successfully defend the claim. It would also mean that it would be much longer before a final hearing can be fixed.

29. On the other hand, were I to refuse the application to amend all would not be lost for the claimant as he would still be able to pursue the claims which he intimated in the originating claim form. I am of the view, therefore, that the balance of prejudice favours the respondent.

30. I am of the view, that, by and large, the submissions by the respondent's solicitor are well-founded.

31. For all these reasons, therefore, I have decided to refuse the claimant's application to amend. In my view, considering all the factors in the round, it is not in the interests of justice to do so and nor is it in accordance with the "overriding objective" in the Rules of Procedure.

Employment Judge **Judge N M Hosie**

Dated **18 October 2021**

Date sent to parties **19 October 2021**