EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4102660/2020 (A)

Held via telephone conference call on 29 September 2020

Employment Judge: R Sorrell

Mrs A S Blue	**Claimant** **Represented by:** **Mr S Smith - Solicitor**
Irvine's Limited	**Respondent** **Represented by:** **Mr W Lane - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the Claimant's application to amend her claim is refused.

REASONS

Introduction

1 The Claimant lodged a claim of constructive unfair dismissal on 19 May 2020.

2 This Hearing was scheduled to determine the amendment application. It took place remotely given the implications of the COVID-19 pandemic. It was an audio (A) hearing held by telephone.

3 The application was heard by way of oral submissions. There was a short adjournment during the course of the Hearing for the Claimant's solicitor to take instructions from the Claimant.

4 Mr Smith, for the Claimant agreed to send copies to the Tribunal and Respondent of the emails between the Claimant and Respondent dated 12

and 14 April 2020 which are referred to in the amendment application at the end of the Hearing.

The Claim

5 In summary, the Claimant was employed by the Respondent from 1 March 2006 until 19 March 2020 as a Bakery Counter Assistant. In December 2019 the Claimant's Doctor diagnosed her with Achilles tendonitis. At the end of January 2020, she was signed off work by her Doctor due to her medical condition and started physiotherapy. On 17 March 2020 the Claimant received a call from the Respondent with the intention of her returning to work and offering her duties that would involve more sitting. On 18 March 2020 the Claimant's Doctor advised the Claimant not to return to work due to her condition as he was concerned there would be an expectancy to assist with other tasks when the shop was busy and because she had not been given lighter duties as agreed in the past with the Respondent when she had a back injury.

6 The Claimant's Doctor thereafter signed her off work due to her condition for a further 3 weeks. On 19 March 2020, the Respondent's Managing Director, Mr Maurice Irvine called the Claimant and she explained her Doctor's advice to him. He responded that he had offered her a job with no moving at all and that he would not be paying her anymore sick pay as he considered it a fraudulent claim and that she was being deceptive. He advised her to see where she stood legally and to think about what she wanted to do. After this telephone conversation, the Claimant felt she had no choice but to resign. She subsequently sent a grievance letter to Mr Irvine informing him that she wished her resignation to be treated as constructive dismissal. On 12 April 2020 Mr Irvine invited her to attend a grievance meeting and asked her to reconsider her resignation. Following further correspondence between the Claimant and Mr Irvine, the grievance meeting did not proceed and the Claimant contacted ACAS who began the process of conciliation with the Respondent.

The Response

7 In summary, the Respondent's response to the claim disputes the Claimant's account of events and it denies that the Claimant was constructively unfairly dismissed contrary to section 94 of the Employment Rights Act 1996 as alleged or at all in that the Respondent's treatment of the Claimant did not amount to a breach of any express or implied terms of her contract of employment.

The Amendment Application

8 On 7 August 2020 the Claimant made an amendment application to include a disability discrimination claim. This application states that the Claimant is entitled to be regarded as disabled in terms of section 6 of the Equality Act due to her suffering from the medical condition of Achilles tendonitis which is likely to last at least 12 months and because of the substantial adverse impact on her ability to carry out normal day to day activities.

9 The application seeks to add two claims under the Equality Act 2010. The first claim is that of direct disability discrimination under section 13 of the Equality Act 2010 in that the Respondent's telephone call of 19 March 2020, the email of 12 April 2020 and the email and text of 14 April 2020 amount to less favourable treatment than the Respondent did or would treat others who have health problems that resulted in their absence, but who were not disabled in terms of section 6 of the Equality Act 2010. The second claim is that of harassment related to disability under section 26 of the Equality Act 2010 in that the same acts had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

10 In terms of the emails referred to, on 12 April 2020 Mr Irvine wrote to the Claimant as follows:

"Dear Alice,

I was surprised to receive your resignation on 19 March 2020 with effect from 19 March 2020. I believe you may have reached this decision in the heat of

the moment and I am now writing to ask whether this is really what you want to do. At the time of your resignation you outlined a number of issues and concerns as the underlying reasons for your decision to resign. In order not to delay addressing these concerns I have arranged a grievance hearing to take place on Thursday April 16th 2020 at 12.00 noon at our coffee shop, 22 Eglinton Street, Beith. This will be chaired by Mr. Robert Geary and someone will be appointed to take minutes. You are entitled, if you so wish, to be accompanied by a fellow employee. If you wish to exercise this right then I would point out that it is your responsibility to make the necessary arrangements. I would be grateful if you could confirm that these arrangements are acceptable.

If you wish to reconsider your decision, please contact me within the next three days and by 14 April 2020 at the latest. If you do not wish to reconsider your decision which was given by text message, I would be grateful if you could confirm it in writing. If you do decide to retract your resignation and remain an employee of Irvine's Ltd, I feel it is only fair to forewarn you that you will continue to be subject of our Forman procedures. Therefore, it would still be our intention to address the outstanding matters which existed prior to your resignation. At this point we will consider whether these matters should be put on hold until your grievances have been heard and an outcome issued, or whether in fact the two procedures can run alongside each other.

I look forward to hearing from you.

Yours sincerely,

Maurice Irvine
For Irvine's Ltd"

The Claimant responded to Mr Irvine on the same date as follows:

"Dear Maurice,

Thank you for your email. Due to the lack of a neutral party or fair representation for myself at your proposed grievance hearing, I don't feel I am in the position to attend at this time. In addition to this, a meeting of this nature

is going against the Government's strict guidelines on social distancing and unnecessary travel in relation to the COVID-19 pandemic. This decision is in line with advice from the Advisory, Conciliation and Arbitration Service, who will be in touch with you in due course."

Best Regards,

Alice"

11 On 14 April 2020 Mr Irvine responded to the Claimant as follows:

12 *"Dear Alice,*

Can you please elaborate as to why you feel the person appointed to hear your grievance is not neutral? We have appointed such person to hear your grievance and investigate this impartially. You of course have the right to be accompanied and this can still be accommodated. I appreciate your concerns due to the current coronavirus situation however we do wish to endeavour to hear your grievance so we are happy to arrange a meeting via telephone, conference call or video chat. Also if you feel this is not appropriate we are prepared to receive written submissions and respond in such a manner. Can you please advise in your preferred method of grievance hearing to allow us to follow company procedure. Also please confirm if you wish to retract your resignation or are standing by this?

Maurice Irvine

For Irvine's Ltd"

13 While the Claimant accepts that these acts took place more than 3 months prior to the application, it is submitted that it is just and equitable to extend time to allow these claims. This is because the Claimant lodged her claim without the benefit of legal advice or legal training and she has made a clear and relevant claim that her Achilles tendonitis caused her to be absent from work and that the reaction of the Respondent to further possible absence led her to resign. The Respondent has been aware of the basic facts and the acts complained of from the outset of the claim and no further acts are relied upon.

The Respondent has had the benefit of legal advice throughout this process and any prejudice caused to the Respondent in allowing this application is outweighed by the prejudice that would be caused to the Claimant if she is not allowed to progress this claim.

The Response to the Amendment Application

14 On the same date the Respondent objected to the application. In its objection, the Respondent submitted that the proposed amendment seeks to introduce two new causes of action and if granted would introduce several new and substantial points in issue. These are whether the Claimant at the relevant time had a disability in terms of section 6 of the Equality Act 2010, whether the acts relied upon amounted to the Respondent treating the Claimant less favourably than it treats or would treat others and if so, whether the less favourable treatment was because of disability. Further, whether the acts relied upon constituted unwanted conduct and if so, whether the unwanted conduct was related to disability and if so, whether the unwanted conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The Respondent submits that the ET1 form does not make express or implied reference to these points in issue.

15 The Respondent further submitted that the proposed amendment is out of time as it was submitted on 7 August 2020 which was 2 days after the expiry of the time limit extended by the ACAS early conciliation process. In respect of extending the time limit under section 123 (1) (b) of the Equality Act 2010, the authority of **Bexley Community Centre (t/a Leisure Link) v Robertson 2003 EWCA Civ 576** was relied upon in that time limits are strictly applied in employment cases, there is no presumption in favour of extending time, employment tribunals should not extend time unless the Claimant satisfies the tribunal it is just and equitable to do so, the burden is on the Claimant and the exercise of discretion to extend time is the exception not the rule.

16 The Respondent did not accept that the Claimant's submissions in support of extending the time limit were sufficient to justify an exceptional exercise of

discretion to extend time. In particular, they did not explain why the Claimant was unable to present the disability discrimination complaints in time when there is a wealth of freely accessible advice in the public domain on the possibility of presenting such complaints and such complaints are routinely presented without having professional legal advice or representation. The Claimant must also have been aware from section 8.1 of the ET1 form of the possibility of presenting such complaints prior to the time elapsing and elected not to do so.

17 The Respondent relied upon the authority of **Amey Services Ltd and another v Aldridge and others UKEATS/0007/16** which held that determining an amendment application is a single-stage exercise that cannot be allowed subject to time bar issues.

18 In terms of the timing and manner of the application to amend, the Respondent adopted its submissions in respect of time limits.

19 The Respondent further submitted that granting the application to amend would cause significant injustice and hardship to the Respondent because the introduction of the new complaints would open up significant lines of factual and legal enquiry and progress has already been made in its preparations for a final hearing of the case. If the amendment application were allowed the Respondent would be obliged to amend its response, review its records for relevant documentation in terms of the new points in issue, investigate and form a view on the Claimant's asserted disability status and re-precognose witnesses. Requiring the Respondent to do so would also be contrary to the Overriding Objective as it would increase the formality of the proceedings and related expense. Yet, if the application to amend were refused, the Claimant would still be permitted to proceed with her existing constructive unfair dismissal complaint against the Respondent which would counter-act any prejudice caused to the Claimant in refusal of the application.

Claimant's Submissions

20 Mr Smith, for the Claimant made the following further oral submissions in support of the written application to amend the claim.

21 The claim form was presented by the Claimant when her son represented her. While it is accepted that the Claimant did not indicate at section 8.1 of the ET1 form that she was claiming disability discrimination, she did not know she had a right to make that claim and received no advice about it. Prior to lodging her claim, ACAS advised her that she only had a constructive unfair dismissal claim and she was unable to obtain advice from the Citizens Advice Bureau in North Ayrshire. She did speak to her divorce lawyer about it but employment law was not within her area of expertise, so she could therefore not advise her and the Claimant was left in limbo.

22 When the Claimant submitted her claim in May she hoped that the Achilles tendonitis would not last as long as it has. At that time it had lasted for 9 months. It is now clear from the first paragraph of the amendment application how disabling her medical condition is and that it will last more than 12 months.

23 The facts arising from the disability discrimination claim are the same as those relied upon for the constructive unfair dismissal claim in that the Claimant sustained an injury of Achilles tendonitis and the treatment by the Respondent in terms of her sickness absence because of that.

24 The Claimant set out the account of events in the ET1 form that led to her constructive unfair dismissal claim. These events turn on the telephone call that took place between the Claimant and the Respondent on 19 March 2020 which is relied upon in respect of the disability discrimination claims. The ET3 response does not appear to deny that the comments made in this telephone call to the Claimant were made. These claims would be out of time by 2 days which should not be fatal to the amendment application given that the Claimant was unrepresented.

25 While there is not too much dispute regarding the facts in this case, parties are quite far apart on the law. The Claimant submits that the authority of **TGWU v Safeway Stores Ltd UKEAT/0092/07/LA** is more relevant than the case of **Bexley ("supra")** which considers at paragraphs 9 and 10 how timescales should be regarded in an amendment application and that in accordance with **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 65** and **Selkent Bus Co Ltd v Moore [1996] ICR 836**, the whole context of the claim has to be looked at.

26 In terms of prejudice, the Respondent was on notice of the amendments to the claim within 2 months of the claim being presented which as considered in paragraph 20 of **TGWU ("supra")**, is not unreasonable and the claim was brought less than 3 months after the acts complained of. As to any additional costs, the information should already be with the Respondent as the Claimant had five separate telephone conversations with the Respondent about her health after consultations with her Doctor and the Respondent has the medical evidence in support of that.

27 If the amendment application is refused, the Claimant loses a claim the Equality Act is specifically designed for which prevents the Respondent from making the comments referred to. While the Claimant will still be able to pursue her constructive unfair dismissal claim, the Equality Act measures quantum in a different way which she will not be able to recover if she cannot be heard on these claims. Such compensation could also not be reduced in terms of a Polkey deduction referred to in the ET3 response.

Respondent's submissions

28 Mr Lane, for the Respondent made the following further oral submissions in response to the written application to amend the claim and the Claimant's oral submissions.

29 The nature of the proposed amendment is in dispute. This is not an amendment which is a relabelling of the claim based upon the existing facts. This amendment purports to raise substantial new issues which do not arise in the constructive unfair dismissal complaint and that involve new questions

of fact and law. The **Selkent** test does therefore not favour this application being allowed.

30 The Claimant accepts that the amendment application is lodged out of time. The last bullet point of paragraph 25 of **Bexley ("supra")** states that the exercise of discretion to extend time is the exception and not the rule. The Claimant therefore has to satisfy the Tribunal that this is an exception. The authority of **TGWU ("supra")** does not materially go against the Respondent's submissions because of the key point made that time limits are a factor to consider. While it is not the only factor to consider it is still an important point and can justify a refusal. The purported reasons for extending the time limit do not hold much weight. The Claimant not being in receipt of legal advice or any legal training falls far short of justifying an extension of time. These reasons do not provide a logical explanation. There is a wealth of information in the public domain about employment tribunal claims. Unrepresented individuals routinely make such complaints and the Claimant has lodged a constructive unfair dismissal claim which is far more complex than a disability discrimination claim. The Claimant must have read section 8.1 of the ET1 claim form which gives clear notice that a disability discrimination claim could have been made. She could at least have sought professional advice in relation to that but for whatever reason she did not elect to do so. Accordingly, this is not an exceptional situation and the application falls.

31 Furthermore, the Claimant has made additional and new submissions at this Hearing which the Respondent has not had fair or adequate notice of. The amendment application was presented on the basis the Claimant did not have legal advice at the time of presenting her claim. However, the Claimant has now made representations regarding purported advice from ACAS and other attempts made to seek advice which should be treated with sceptism. The amendment application does also not state that the Claimant's medical condition is likely to last at least 12 months, even though the Claimant has made submissions that this was apparent at the time the application was made. As this is an ex parte statement of medical opinion, it is not legitimate for the Tribunal to accept it either.

32 The Respondent will suffer greater injustice and hardship if the application is allowed than the Claimant would if it were refused. There are six substantial lines of enquiry set out in the written objections that the Respondent would have to address, the Respondent would effectively have to start from the beginning again as it will be obliged to amend the response, respond to the issue of disability status and re-precognose witnesses. This would entail a lot of work and effort. At this Hearing the Claimant has also referred to five additional telephone calls that took place between parties about her health which are not mentioned in the amendment application. The application is therefore not comprehensive and may mean further new facts will be relied upon at a later date.

33 It is also not accepted that the response to the claim does not dispute the content of the telephone call between the Claimant and Respondent on 19 March 2020 as there is a general denial in paragraph 2 of the response which when read in tandem with paragraph 14, makes it clear there is no admission or an implied acceptance at all. Further, while the Equality Act 2020 is designed to deal with discrimination complaints, section 123 of the Act requires that these must be brought within 3 months of the alleged acts.

34 If the application is refused the Claimant still has a live constructive unfair dismissal complaint that counteracts any injustice suffered by the Claimant and which is a route to a substantial remedy due to the Claimant's length of service. A final virtual hearing for this claim is already listed for 5-6 November 2020 and if the amendment is allowed it is likely to put back these dates which will not be of benefit to either party.

Relevant Law

35 The leading authority of **Selkent Bus Co Ltd v Moore [1996] ICR836 EAT** in respect of the approach to be taken in amendment applications provides that a Tribunal must carry out a careful balancing exercise of all the relevant factors having regard to the interests of justice and to the relative hardship that will be caused to parties by granting or refusing the amendment. The

factors to consider are the nature of the amendment, the applicability of time limits and the timing and manner of the application.

Conclusions

36 Having carefully assessed parties' submissions and representations made in the round, I am of the view that on balance this application should be refused because the Respondent will suffer a greater injustice and hardship in the amendment being allowed than the Claimant will by it being refused. In reaching this view I have carried out the balancing exercise in accordance with **Selkent Bus Co Ltd ("supra")** and have taken account of the relevant factors in doing so.

37 I considered that the amendment is a new cause of action and not merely a re-labelling of the claim. This is because disability discrimination is a separate jurisdiction from constructive unfair dismissal with its own applicable legal tests and facts. While the Claimant has submitted that the Respondent has been aware of the basic facts and acts complained of from the outset of the claim and that no further acts are relied upon, I considered that facts in addition to the telephone call of 19 March 2020 and the three emails between parties of 12 and 14 April 2020 would require to be relied upon, particularly as the content of the email exchanges essentially concerned the Claimant being invited to a grievance hearing and to reconsider her resignation. I further noted that during oral submissions the Claimant made reference to five additional telephone conversations between the Claimant and Respondent regarding her health which are not included in the ET1 claim form or amendment application.

38 I am also of the view that the disability discrimination claims lack specification. In particular, the direct discrimination claim does not set out the specific alleged acts of discrimination, details of an actual or hypothetical comparator, the nature of the less favourable treatment, the basis for that treatment being because of the Claimant's disability and the facts that the Claimant will offer to prove that the alleged less favourable treatment was because of the Claimant's disability. Equally, the harassment claim does not specify the

alleged acts that constitute unwanted conduct, the basis for that treatment relating to the Claimant's disability and the purpose or effect of that conduct or the facts that the Claimant will offer to prove that the harassment related to her disability.

39 As the amendment is a new cause of action there is a time bar issue in that the proposed amendment was submitted on 7 August 2020 which was 2 days after the expiry of the time limit of the original claim. There was also more than two months delay in between presenting the claim and lodging the amendment application. While I have noted the length of delay in lodging the application after the expiry of the time limit, the fact that the time limit had expired is a factor that weighs against the Claimant. In assessing whether it is just and equitable to extend the time limit in accordance with section 123 of the Equality Act 2010, I noted that the Claimant had no legal training and was unrepresented at the time of presenting her claim. I further noted that additional reasons for the delay in making the application were made at this Hearing concerning access to advice that were not included in the amendment application and which the Respondent did not have due notice of.

40 Having considered parties' representations, I am of the view that the Claimant had knowledge of all the material facts to plead a claim for disability discrimination at the time of her email correspondence with the Respondent on 12 and 14 April 2020 after her resignation on 19 March 2020 and when presenting her constructive unfair dismissal claim on 19 May 2020 and that her lack of representation did not prevent her from lodging that claim. This is particularly as the ET1 claim form gives clear notice that a disability discrimination claim can be brought and that the Claimant was able to indicate she was making a constructive unfair dismissal claim. Furthermore, while it is submitted the Claimant had difficulties in accessing advice, I considered that on these facts the delay between presenting the claim and lodging the amendment application also weighed against her. I therefore considered that in these circumstances, there were no exceptional reasons to extend time and it was not just and equitable to do so.

41 In terms of the relative hardship that would be caused to the parties by granting or refusing the amendment, I am satisfied that allowing the amendment would open up new lines of factual and legal enquiry which would clearly protract these proceedings. This is because the Respondent would require leave to amend the response, there may need to be a further preliminary hearing to determine whether the Claimant was disabled at the material time in terms of section 6 of the Equality Act, as well as additional disclosure of documentation between parties in relation to that. In the event it was determined the Claimant was disabled at the material time, further specification of the disability discrimination claims would be necessary and there may be a need for additional witnesses that would elongate the evidence and the Final Hearing which would incur further costs. While I have noted the Claimant's position that she will suffer greater hardship if the amendment is refused as she loses her right to a claim under the Equality Act and to compensation of injury to feelings which would not be subject to a Polkey deduction, I considered that any hardship suffered by the Claimant is mitigated by her still having a live constructive unfair dismissal claim.

42 For all these reasons I am of the view that it is in the interests of justice to refuse this application and in accordance with the Overriding Objective under Regulation 2 of the Employment Tribunal Regulations 2013 to deal with cases fairly and justly.

Employment Judge: **R Sorrell**
Date of Judgment: **5 October 2020**
Entered in register: **20 October 2020**
and copied to parties