EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4106963/2020 and another

Preliminary Hearing held remotely on 14 October 2021

10 **Employment Judge A Kemp**

Miss D Pron	**First Claimant** **Represented by:** **Mr S Smith,** **Solicitor**
Mrs I Pron	**Second Claimant** **Represented by:** **Mr S Smith,** **Solicitor**
Menzies Distribution Ltd	**Respondent** **Represented by:** **Mr O Holloway,** **Counsel** **Instructed by:** **Ms G Patti,** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Tribunal grants the claimants' application to amend their claims in respect of the Further and Better Particulars provided on 8 April 2021 in so far as it refers to claim one, and claims two and three on the protected characteristic of race, reserving whether claims two and three are in the jurisdiction of the Tribunal for later determination.

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2. The Tribunal refuses the claimants' application to amend their claims in respect of the Further and Better Particulars provided on 8 April

2021 in so far as it refers to claims two and three on the protected characteristic of pregnancy.

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REASONS

Introduction

1. This was a Preliminary Hearing held to consider applications made by both parties. The respondent sought a strike out of the second and third claims set out by the claimants in their Further and Better Particulars, and the
10 claimants sought to amend their claims to include those Particulars.

2. The parties were each represented. An interpreter Ms Magdalena Moore attended, and translated all that was said into Polish as the two claimants also attended. The proceedings were conducted remotely.

3. The Notice of Hearing for the hearing before me referred only to the
15 determination of an application for strike out made by the respondent. The claimants had however by email dated 11 July 2021 proposed that their Further and Better Particulars be treated as an application to amend, and that was in a sense a defence to the application for strike out.

4. After discussion with the representatives for the parties it was agreed that
20 the appropriate application to consider initially was that for amendment made by the claimants, and only then consider if any strike out was sought. The hearing was therefore converted to one for amendment of consent of the parties. It was heard remotely by Cloud Video Platform as that Notice stipulated.

25 5. The claimants initially wished to give evidence but after they were provided with time to give instructions to their solicitor, that was not sought and matters proceeded by way of submissions as is normal in such applications.

Background

6. There was no hearing of evidence, but the following matters arose from the submissions and are or at least may be relevant to the exercise of discretion.

7. The claimants are employed by the respondent. They are Polish by nationality. They have some but not a strong command of English.

8. Early Conciliation was commenced on 22 October 2020 and a Certificate was issued on the same day.

9. A Claim Form was presented to the Tribunal on 2 November 2020. It referred to a claim of discrimination, and then both to section 13 of the Equality Act 2010 and to indirect discrimination which is under section 19. It referred also to a complaint which had been made to the respondent on 13 August 2020 and that there had been an appeal, without an outcome. The protected characteristic relied upon was solely that of race. The claim was at that stage made by three claimants, who did not have representation by a solicitor or other qualified representative.

10. There was a Preliminary Hearing held on 15 January 2021 before EJ d'Inverno, who granted various orders including one for Further and Better Particulars. That was partly as the Claim Form referred both to section 13 of the Equality Act 2010, which refers to direct discrimination, and to indirect discrimination which is provided for in section 19, and partly as the claim or claims being made had not been sufficiently specified.

11. The claimants sought to obtain legal advice initially near where they lived, but did not succeed.

12. Initial responses were provided by the claimants themselves on 1 February 2021 and on 18 March 2021 which indicated that the claims were for indirect discrimination, but it was accepted that they did not comply with the orders.

13. On 26 February 2021 the claimants were able to instruct their present solicitors under the legal aid scheme. Initially that only allowed advice to be given, which included drafting a letter of 18 March 2021. Funding to

allow representation at the Tribunal was not provided by the Scottish Legal Aid Board until 1 April 2021.

14. Various extensions of the date for compliance with the order for Further and Better Particulars were granted by the Tribunal, until on 1 April 2021 an unless order was made for them to be provided within 7 days.

15. On 8 April 2021 the solicitors instructed by the claimants wrote to the Tribunal with Further and Better Particulars, and set out three claims, all of which were for direct discrimination under the Equality Act 2010. The first claim was in respect of less favourable treatment by requiring Polish workers to undertake a heavier workload than British workers, with the sole protected characteristic relied on being race. It was said to involve all the respondent’s managers and supervisors (“claim one”). The second claim related to the first claimant suffering a miscarriage on 31 December 2019, and then being required to provide documentation in relation to that, said to have occurred on 31 January 2020. The third claim related to the second claimant and an application for flexible working made in March and April 2020. The protected characteristics sought to be relied upon for the second and third claims were both race and pregnancy. In each of claims two and three the manager said to be involved was Mr A Brodie (“claims two” and “three” respectively).

16. The respondent provided an Amended Response in which it denied the allegations and sought strike out of the second and third claims on the basis that they had not been pled before then, and were substantially out of time such that it was not just and equitable to allow them to proceed. That application for strike out was not made in respect of the first claim.

17. On 11 July 2021 the claimants’ solicitor wrote to the Tribunal to state that the Particulars should be treated as an application to amend. It was accepted by the respondent in reply that the application to amend in respect of claim one was not opposed such that it was appropriate to proceed to a Final Hearing, but it objected to the amendment in respect of claims two and three.

18. The claim of one of the claimants Mr D Kaszuba was later dismissed on withdrawal under Rule 52, leaving the claimants as the first and second claimant who are daughter and mother respectively.

Submissions

5 19. The following contains a very basic summary of the submissions that were made.

(i) Claimants

20. The claimants made reference to the history of matters in the documentation. The grievance on 13 August 2020 referred to Mr Brodie. 10 The grievance appeal outcome letter dated 7 October 2020 referred in effect to claims two and three. It was accepted that the Claim Form did not refer to the protected characteristic of pregnancy, nor to Mr Brodie by name, and that the Agenda return from the claimant did not do so. After the Preliminary Hearing the claimants had tried to get legal advice initially 15 without success, but latterly through their current solicitors but under legal aid restrictions. Correspondence sent by the claimants to the Tribunal had referred to Mr Brodie, although it was accepted that they were not the Further and Better Particulars required. The amendment application was made on 8 April 2021 and had claims, the first being in the Claim Form, 20 the second referred to on 1 February 2021 and the third on 18 March 2021.

21. Reference was made to the ***Selkent*** factors. The claimants argue for direct discrimination as what was described as a continuing course of conduct from December 2019 onwards which included a difference in treatment, and the involvement of Mr Brodie. Reference was made to the 25 cases of ***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96, Veolia Environmental Services v Gumbs EAT/0487/12, Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0320/15, TGWU v Safeway Stores Ltd UKEAT/0092/07,*** and ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204***.

30 22. It was argued that the Tribunal should hear all the evidence and assess whether there was continuing conduct or if it was just and equitable to

allow a late claim, and that the amendment should be allowed to enable it to do so.

(ii) Respondent

23. There were four matters to have regard to – (i) the nature of the amendment (ii) the applicability of time limits (iii) the timing of the application and (iv) the balance of prejudice. The amendments for claims two and three were different to that for claim one. They were new claims. The Claim Form had not provided notice of the claim brought and the basis for that.

24. The second and third claims were substantially outwith the primary time limit. For the second claim the events were up to 31 January 2020, for the third in the period March and April 2020. The application to amend was not made until 11 July 2021. Even if it was the earlier date of 8 April 2021 it was about a year or more late, against a primary time limit of three months. If outwith time that was not determinative but it was an important and potentially decisive factor. The argument of a continuing act was not relevant to these claims. There had been no good reason not to pursue matters in time. The first claimant had set out detailed factual matters in the August 2020 complaint which were sufficient for inclusion in a Claim Form. The language barrier was not a barrier to doing so.

25. The balance of prejudice favoured refusing the applications. The first claim did not name Mr Brodie, but all managers and supervisors, and is distinguished from the second and third claims. There is significant prejudice in seeking to defend claims so substantially out of time. One potential witness had left the employment of the respondent, and another was shortly to do so. The claimants had the first claim that would proceed to a hearing.

26. This was not an amendment from new facts arising, or new information coming to light. The amendment should be refused so far as claims two and three were concerned.

The law

(i) Amendment

27. A Tribunal is required when addressing such applications as the present to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

> "2 **Overriding objective**
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> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
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> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
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> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
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> (e) saving expense.
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> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

28. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to address that, save in respect of additional respondents in Rule 34. Whether or not particulars amount to an amendment requiring permission from the Tribunal to be received falls within the Tribunal's general power to make case management orders set out in Rule 29 which commences as follows:

> “**29 Case management orders**
>
> The Tribunal may at any stage of the proceedings, on its own initiative or on application to make a case management order….”

29. Earlier iterations of the Tribunal Rules of Procedure did contain a specific rule on amendment, and the changes brought into effect by the current Rules, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, require to be borne in mind when addressing earlier case law.

30. The nature of the exercise of discretion in amendment applications was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. In that case the application to amend involved adding a new cause of action not pled in the original claim form. The claim originally was for unfair dismissal, that sought to be added by amendment was for trade union activities. The Tribunal granted the application but it was refused on appeal to the EAT. The EAT stated the following:

> “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.
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> What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant;
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> *(a) The nature of the amendment*
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> Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions 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 provisions, eg, in the case of unfair dismissal, s.67 of the 1978 Act.

(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 Rules 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."

31. In ***Harvey on Industrial Relations and Employment Law*** Division PI, paragraph 311, it is noted that distinctions may be drawn between firstly cases in which the amendment application provides further detail of fact in respect of a case already pleaded, secondly those cases where the facts essentially remain as pleaded but the remedy or legal provision relied upon is sought to be changed, often called a change of label, and thirdly those cases where there are both new issues of fact and of legal provision on which the remedy is sought, of which ***Selkent*** is an example.

32. The first two categories are noted as being those where amendment may more readily be allowed (although that depends on all the circumstances and there may be occasions where to allow amendment would not be appropriate). The third category was noted to be more difficult for the applicant to succeed with, as the amendment seeks to introduce a new

claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time.

33. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said this in relation to an amendment which arguably raises a new cause of action and therefore in the third category, suggesting that the Tribunal should

> " … focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

34. In order to determine whether the amendment amounts to a wholly new claim and in the third of the categories set out above it is necessary to examine the case as set out in the original Claim to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v Bryant [1999] ICR 123***). In that case the claimant made no reference in her original unfair dismissal claim to alleged victimisation, which was a claim she subsequently sought to make by way of amendment. The Court of Appeal rejected the amendment on the basis that the case as pleaded revealed no grounds for a claim of victimisation and it was not just and equitable to extend the time limit. It said that the proposed amendment

> "was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time".

35. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time, and the exercise of discretion is the exception rather than the rule (***Robertson v Bexley Community Centre [2003] IRLR 434***), confirmed in ***Department of Constitutional Affairs v Jones [2008] IRLR 128***

36. No single factor, such as the reason for delay, is determinative and a Tribunal should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016]***

IRLR 278. It is a multi-factorial approach considering all material circumstances.

37. In ***Vaughan v Modality Partnership [2021] IRLR 97*** the EAT summarised matters and held that there was a balance of justice and hardship to be struck between the parties.

(ii) Jurisdictional issues

38. There are two possibly contradictory lines of authority at EAT level about how amendment applications should be dealt with where one of the issues is timebar. The more recent line is set out in ***Galilee v Commissioner of Police of the Metropolis [2018] ICR 634***, in which the EAT held that it was permissible to allow amendment but reserving questions of jurisdiction for determination either at a Preliminary Hearing or at a Final Hearing. That results in an amendment being allowed to permit a new claim to be raised, but the issue of whether or not it is in the jurisdiction of the Tribunal is not at that stage determined. The other line of authority is to the effect that questions of jurisdiction on issues of timebar must be addressed at the time of consideration of the amendment, as once accepted the Claim is deemed to have been amended from the date of its presentation initially, rather than when the amendment was sought, on which the authorities include ***Rawson v Doncaster NHS Primary Care Trust UKEAT/022/08, Newsquest (Herald and Times) Ltd v Keeping UKEATS/51/09*** and ***Amey Services Ltd v Aldridge UKEATS/7/16.***

(iii) Time limits

39. Section 123 of the Equality Act 2010 provides as follows in regard to time limits for discrimination claims such as those under section 13 of that Act

> "**123 Time limits**
>
> (1) Subject to [sections 140A and section 140B] proceedings on a complaint within section 120 may not be brought after the end of—
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> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
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> (b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

5 (b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

10 (b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

15 (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

40. This provides in summary that the Tribunal has jurisdiction under the 2010 Act if a claim is commenced (firstly by early conciliation and then by presenting a claim form timeously thereafter) within three months of the
20 act complained of, that being normally referred to as the primary period, but there are two qualifications to that, firstly where there are acts extending over a period when the time limit is calculated from the end of that period, and secondly where it is just and equitable to allow the claim to proceed.

25 41. An act will be regarded as extending over a period, and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant ***(Barclays Bank plc v Kapur [1989] IRLR 387.*** It was also held in that case that it is only the continuance of
30 the discriminatory act or acts, not the continuance of the consequences of a discriminatory act, that will be treated as extending over a period.

42. The Court of Appeal in ***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96*** stated that terms mentioned in the above and other authorities are examples of when an act extends over a period, and

5 “should not be treated as a complete and constricting statement of the ‘indicia' of such an act. In cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what he has to prove, in order to establish
10 a continuing act, is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period.”

43. In ***Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327***, the Court of Appeal stated the following

15 “There is no principle of law which dictates how generously or sparingly the ‘power to enlarge time is to be exercised' (para 31). Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case 'is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case
20 by the tribunal of first instance which is empowered to answer it’.”

44. In Abertawe ***Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** the EAT stated that a claimant seeking to rely on the extension required to give an answer to two questions:

''The first question in deciding whether to extend time is why it is that
25 the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was.''

45. What is just and equitable involves a broad enquiry having regard in particular to the relative hardships parties may suffer.

30 46. There is a further matter to consider, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be

issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. They provide in effect that within the period of three months from the act complained of, or the end of the period referred to in section 123 above if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place.

Discussion

47. I did not make an immediate decision on the competing arguments as I wished to take time to reflect on them, and to read the documentation provided to me again having heard the submissions. I also reminded myself of the terms of the authorities relied on by the claimants (the respondent did not rely on any authority other than ***Selkent*** itself), and researched matters. Although neither representative referred me to authority specifically on the point, I did require to consider how to address an amendment application in circumstances where there is a dispute over whether a claim or claims may be time-barred, on which there are two lines of authority as referred to above. Those two lines of authority cannot easily be reconciled. ***Galilee*** was decided at least partly on issues of English law and practice, which I do not consider find direct equivalents in Scots law and practice.

48. How the overriding objective is to be applied in general terms was reviewed in the case of ***Newcastle upon Tyne City Council v Marsden - [2010] ICR 743.*** The circumstances of that case were different, in that it was an application to review a decision, but the employer relied on the cases of ***Flint v Eastern Electricity Board [1975] ICR 395*** and ***Lindsay v Ironsides Ray & Vials [1994] ICR 384.*** The employment judge held that

those decisions had been superseded by the introduction in the 2014 Rules of the overriding objective, and that a different approach was indicated by the decisions in ***Williams v Ferrosan Ltd [2004] IRLR 607*** and ***Sodexho Ltd v Gibbons [2005] ICR 1647.***

5 49. The then President of the EAT said this in relation to the former two cases

> "it is important not to throw the baby out with the bath-water. As Rimer LJ observed in ***Jurkowska v Hlmad Ltd [2008] ICR 841***, para 19 it is 'basic'
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> > 'that dealing with cases justly requires that they be dealt with in
> > 10 accordance with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made.'
>
> 15 The principles that underlie such decisions as ***Flint*** and ***Lindsay*** remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles."

20 50. In my judgment an amendment if allowed simply permits a claimant to pursue a new matter, whether of fact or law, which was not within the original Claim Form (or Forms as in the present case). It allows the amended claim to be pursued but whether that new claim succeeds is a different matter. Success may depend on establishing jurisdiction as well
25 as on the merits of the claim.

51. I turn to Scots law and practice in relation to matters of amendment. That does not give a binding answer, but guidance which may be helpful to take into account in the exercise of discretion.

52. The nearest equivalent to the issues in the present case in a court action
30 may be a personal injury claim. The procedure for such a claim is different to that in the present claim. An action must generally be commenced within three years of the accident or injury under the Prescription and

Limitation (Scotland) Act 1973, but once commenced there is a period for adjustment of the pleadings, and during that period the pursuer can add to the pleadings a new basis in law for making the claim, doing so after the three year period has expired, which will be competently before the court, and brought in time.

53. Once that period of adjustment is completed however, the position is different. There is then a Closed Record, and amendment thereafter which may bring in a new claim requires the consent of the court. Amendment can be allowed or refused in the discretion of the Court. There are separate rules for the Court of Session and the Sheriff Court, but the principles underlying them are the same.

54. Chapter 24 of the Rules of the Court of Session makes provision for amendment, but the Rules do not state specifically a procedure in the event that the amendment by a pursuer seeks to introduce a new claim which the defender claims is timebarred. That was referred to in ***Docherty v Secretary of State for Business, Industry and Strategy [2017] CSOH 54*** a personal injury action in which the motion was to allow an amendment and in the circumstances of that case the discretion was not exercised in favour of the pursuers, such that the amendment was refused. That took place on the basis of the Minute of Amendment, Answers, and submissions.

55. There are other circumstances where it is not clear when a right of action arose, for example the date on which a pursuer knew or ought to have known of the right of action, which is when the period for timebar purposes starts. In such a case where there is an evidential dispute, the court can hold a preliminary proof on that question.

56. A preliminary proof is also competent when an argument is made under section 19A of the Prescription and Limitation (Scotland) Act 1973 in relation to a personal injury action raised outwith the statutory time limit of three years. In ***Donald v Rutherford 1984 SLT 70*** an Extra Division of the Inner House of the Court of Session considered the terms of section 19A. Lord Cameron said the following:

> "Before parting with this case I would draw attention to a difficulty which almost inevitably must arise in dealing with a claim that an action already time-barred should be allowed to proceed, when the only material upon which the court is asked to exercise an equitable jurisdiction is contained in pleadings and certain admitted (but not necessarily complete) correspondence. In the present case I do not think that the interests of parties have been prejudiced by the course which the proceedings took, but when the issues are more complicated and the salient facts less clear than they are in this case, then I think it may well be in the interests of parties that the question of the applicability of s. 19A of the Act of 1973 should be decided on the result of a preliminary proof on the relevant averments and pleas of parties."

57. In the case of ***Argyll and Clyde Health Board v Foulds and others UKEATS/009/06*** Lady Smith at the EAT said this in relation to Scots law and practice, in the context of amendment of a Tribunal claim:

> "19. I would, at this point, observe that the 2004 rules make provision for amendment in a similar manner to that which is provided by the Rules of the Court of Session. Rule 24.1 of those rules provides that, in any cause, the court may, at any time before final judgment, allow:
>
> > ' (2)…….
> > (d) where it appears that all parties having an interest have not been called or that the cause has been directed against the wrong person, an amendment inserting ……an additional or substitute party……' .
>
> 20. In both cases, a wide discretion as to whether to allow the amendment is conferred by the rules. It is within the discretion of the court to allow such an amendment even if time bar questions are liable to arise because of late service on the new defender, such questions being a matter of substantive law and not covered by the rules of court. It is though unlikely that the court will be persuaded to do so if it is plain from the pursuer's

> case that he will have no answer to the time bar point. It may not be plain though; the case may, for instance, require consideration of whether the provisions of sections 17 or 19A of the Prescription and Limitation (Scotland) Act 1973 apply, a matter in respect of which there will often require to be a preliminary proof."

58. Some issues of jurisdiction on issues of timebar may be clear from their face. ***Newquay*** is an example of a case where there was a discrete period of time involved which had ended, such that unless it was just and equitable to extend time it was outwith the jurisdiction of the Tribunal. There are other cases however where that clarity on timing is lacking.

59. In ***Bear Scotland v Fulton and another [2015] ICR 221*** the EAT said the following in relation to ***Selkent, Rawson*** and ***Newsquay***:

> "It is clear from these authorities that the usual principles for amendment of a claim include a requirement to determine at the stage of exercising discretion to grant or refuse the application (i) whether the amendment seeks to bring in a claim that would otherwise be time barred and (ii) if so, whether there are good reasons, taking into account injustices and hardship that may be the result, to grant the amendment notwithstanding that the effect will be to allow the amending party to avoid the usual consequences of presenting a claim out of time."

60. That analysis is contradicted by the decision in ***Galilee***, and is not in my opinion entirely consistent with the decision in ***Marsden,*** which does not appear to have been cited in ***Amey.***

61. ***Rawson*** was a case where a claimant sought to introduce out of time a new claim of disability discrimination which had not been pled initially. The appeal was allowed, but the reason for that was that the Judge had not in terms considered the issue of whether it was just and equitable to allow the claim to proceed. If it was, that would point strongly but not determinatively towards allowing the application to amend, and if not it would point strongly but not determinatively against that. The EAT did not

specifically address the point of whether a factual dispute, if there was such, could be reserved for decision after allowing the amendment.

62. ***Selkent*** also stated specifically that in addition to the three factors referred to all of the circumstances required to be taken into consideration, and I respectfully agree with the EAT in ***Galilee*** when it stated in relation to the use of the word 'essential' in relation to considering time limits should not be taken

> "in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues should be decided before permission to amend can be considered"

63. ***Selkent*** did not consider specifically whether there may be a disputed issue of fact in relation to jurisdiction.

64. In light of the foregoing analysis and with respect I do not consider that the ***Amey*** quotation that there is a requirement to determine the issue of timebar when considering whether or not to exercise discretion to allow or refuse an application to amend is correct if it was intended to be an absolute rule. It may not have been so intended as there is reference to "the usual principles", which may on one construction admit of exceptions.

65. I do not consider that to take a decision on an amendment which may or may not be timebarred, dependent on disputed facts concerning conduct extending over a period quite apart from what is just and equitable, in the absence of evidence on those facts, could be in accordance with the overriding objective as it would not be just to do so. Whilst the terms of the overriding objective do not give carte blanche to do as one wishes, the Tribunal requires to give effect to the Rule when exercising any power given to it by the Rules, which includes that for case management.

66. I therefore consider that the ***Galilee*** line of authority is to be followed, at least in the circumstances of the present case, although I do so for somewhat different reasons than those set out there and having regard also to the law and practice in the Scottish courts referred to above, rather than the law and practice in England.

67. It follows from my conclusion that an amendment can be allowed in whole or part subject, in a case where there is a dispute on facts material to the issue of whether a claim in relation to timebar is within the jurisdiction of the Tribunal, to those facts being determined by evidence, on which case management is required to address the procedure to be followed. I consider that the ability to reserve the issue of jurisdiction in such a manner is a matter to take into account when considering the issue of timebar in the exercise of discretion.

68. The ***Selkent*** principles, as they have become known being the matters referred to in the case of that name set out above, are I consider a good starting point for consideration of whether or not to allow amendment. They are not exhaustive but provide a framework for consideration of the issues that arise. I shall deal with each remaining proposed new claim in turn.

(i) Nature of amendment

69. There were two amendments that the claimant wished to pursue which the respondent challenges. For the two that are opposed I considered whether there was a causative link with the original Claim Form, which refers only to the protected characteristic of race. There is in the Claim Form a reference to the complaint of 13 August 2020 but that is essentially a collective complaint by Polish workers for having been given a heavier workload than British workers. All managers and supervisors are said to have been involved in that. The complaint was signed by six of the employees. There is reference to an appeal, but not the appeal outcome letter dated 7 October 2020, despite that having been sent over three weeks before the Claim Form was presented.

70. I consider that claims two and three based on the protected characteristic of pregnancy are new claims which are very different to those in the Claim Form. There is no causative link to the Claim Form for that protected characteristic in my view.

71. In respect of the claim on the protected characteristic of race there is a limited causative link to what is in the Claim Form, but it is I consider there.

The circumstances are not applicable to Polish workers as a group, as the first claim is, but to the second and third claimants as individuals however they are Polish by nationality and it is arguable at least that acts alleged to have taken place involving a specific manager are a part of conduct of the respondent's managers more generally such as to fall within the term of acts extending over a period. The second claim relates to the first claimant's miscarriage, and the second to an application for flexible working by the second respondent. Although they do refer to the protected characteristic of race how they were allegedly handled by the respondent is a matter of fact, and these issues may be relevant to consideration of whether or not the burden of proof has shifted under section 136. The claims in the amendment application all fall in the category of direct discrimination under section 13 but that by itself is not sufficient. What is I consider relevant in this context is firstly that the basic facts which could found a claim under section 13 on the protected characteristic of race, essentially less favourable treatment of Polish workers, are in the Claim Form, however lacking in specification they are, and what the amendment seeks to do for claims two and three is to add detail on to that. The claim remains overall one for direct discrimination on grounds of race, what is sought to be changed are the facts relied on for that claim. They are new facts to support that claim, rather than an entirely new claim in so far as reliant on the protected characteristic of race, in my judgment.

(ii) Time limits

72. There is an issue raised over timebar. It is not a simple matter to address. The claimants alleged that there was conduct extending over a period for the purposes of section 123 of the 2010 Act for the first claim in relation to the protected characteristic of race, commencing in December 2019, such that the matters in claims two and three are said to be a part of that conduct. There is a different protected characteristic of pregnancy also founded on in the amendment, but there is I consider no basis to argue that there was conduct extending over a period for that issue, and the delay in commencing the claim is lengthy, as I shall come to. There is also a dispute in the context of the protected characteristic of race as to whether or not there was conduct extending over a period, and if so what

period, as well as competing arguments over whether or not it is just and equitable to allow a claim if late. What is I consider relevant in this context is firstly that the events for claim two took place in December 2019 and January 2020, which means that early conciliation ought to have been started by 30 April 2020 in the absence of conduct extending over a period, and for claim three where the events were in March and April 2020 which in turn means that early conciliation ought to have been started for that claim in the absence of conduct extending over a period by 31 July 2020. Early Conciliation was in fact not commenced for well over two months after that latter date, on 22 October 2020 on which date the certificate was issued. The claim or claims involved ought to have been commenced within one month of the certificate that would have resulted had early conciliation been commenced in time, and assuming a period of one month for conciliation and then a further month under the provisions for early conciliation the latest date to commence such a claim (if pursued individually in the absence of conduct extending over a period) would have been 30 June 2020 and 30 September 2020 respectively. At the very best for the claimants the Particulars which amount to the application to amend were provided on 8 April 2021, although it was over three months later that it was stated to be an application to amend. The delay is significant in total, at the very shortest six months but for the ground of pregnancy in claim two longer than that, and as early conciliation was not commenced timeously the delay is of the order of one year. That delay is set against the primary time limit of three months.

73. I consider that the amendment application in so far as it seeks to rely on the protected characteristic of pregnancy is out of time, in that it appears to me clear that it would not be just and equitable to allow that claim to proceed after such a lengthy delay in the circumstances.

74. The position is different for the protected characteristic of race, in my judgment. I consider that whether or not the alleged acts in claims two and three occurred, and if so whether they are part of conduct extending over a period, are best determined after hearing all the evidence in the present case. The alternative is to try to make an assessment of the amendment based purely on submission, where there are competing arguments as to

fact and a very limited basis on which it is possible to assess which party is right, and to what extent. For example it is said by the respondent that the three claims are very different, the first being for all managers and supervisors, but the second and third directed only to Mr Brodie. That is correct so far as it goes, but it appears that Mr Brodie must be one of those managers or supervisors referred to in claim one. The extent to which he was involved in the matters alleged in claim one, if they occurred and if he was involved at all, are matters of fact better assessed after hearing the evidence. The Tribunal can consider at case management whether that is best addressed at a Preliminary Hearing or a Final Hearing

75. The relative hardships suffered by the parties is relevant in the assessment of what is just and equitable for the purpose of section 123. There is clearly potential for hardship to a respondent in seeking to investigate and defend new claims made after such a length of time, both ones with a new protected characteristic but also new facts not originally pled which refer to events in particular as claims two and three do, but in addition I was told that one potential witness had left the employment of the respondent, and another was shortly to do so. It is possible that that may cause a degree of prejudice dependent on the extent to which that person or those persons co-operate voluntarily. At this stage that is not known, but it can be referred to at the stage of the evidential Hearing. In any event delay does tend to mean that recollections are more liable to be faded or unreliable, documents may be less easy to recollect or trace, and presenting a defence to such a claim is liable to be more difficult, but again that can be addressed in the evidence. That prejudice is set against the loss of two claims that the claimants wish to pursue if the amendment is refused, but also where they have one claim not opposed for amendment, where evidence can be heard on matters of background which may, if permitted by the Tribunal hearing the evidence, include the basis of the facts in claims two and three as relevant to the claim that is claim one. If that evidence is relevant to claim one, permitting claims two and three to proceed on the basis of the same protected characteristic reduces the hardship the respondent may suffer.

76. The reason for the delay in the factual basis of claims two and three as claims of race discrimination is explained in part by the fact that the claimants are Polish, with less than complete command of English, and had difficulty in securing legal representation. It may or may not be a sufficient reason and is also better assessed after hearing all the evidence. Referring to an entirely new protected characteristic of pregnancy at such a late stage, and when it had not been raised until at the earliest in informal correspondence, not pleading, on 1 February 2021 being almost exactly a year after that event, puts that into a different category, in my opinion.

77. Whilst each side may suffer prejudice accordingly I consider that this is a matter that favours the argument for the respondent which will I consider suffer materially greater prejudice if the application in relation to a new protected characteristic is granted, such that it is not just and equitable to allow the claim to proceed, and it would therefore be regarded as outwith the jurisdiction of the Tribunal if that matter is looked at in isolation. In so far as the claims for the protected characteristic of race is concerned I consider that it is not clear at this stage whether or not they are within the jurisdiction of the Tribunal, and that it is in the interests of justice to reserve that matter for determination after the Final Hearing.

(iii) Timing and manner

78. The application followed the Preliminary Hearing, which in turn followed matters being raised in the agenda return provided by the claimants and the Claim Form they had themselves prepared. There was some delay before solicitors were instructed, and could then fully act rather than simply give advice. The Particulars when received did comply with the Orders, but also raised in part new issues, firstly a new protected characteristic and secondly new details of fact. That was before any case management orders for a Final Hearing. I also take into account that the claimants are Polish nationals, seeking to operate in these proceedings in their second language, who had difficulty in obtaining legal advice. Those factors tend overall to support the application but only to a limited extent.

(iv) Analysis

79. The above are not exhaustive factors. I also considered the situation as a whole. It did not appear to me possible to make an assessment of whether the claims that are opposed had reasonable prospects of success or not. It did appear to me at best surprising that if those issues were of such significance that there was not matter raised about the formally by grievance or otherwise at the time, nor any early conciliation, nor any Claim Form itself. It was explained that the claimants remain employed, but that applies equally in respect of claim one. I take into account that English is not the claimants' first language, and that is clear from the Claim Form and documents the claimants themselves prepared, but it appears to be adequate to set matters out to some extent at least. I take into account also that until the current solicitors were instructed the claimants were party litigants, or seeking to advise themselves before proceedings were commenced. It was not suggested however that there was any impediment to finding out about claims to make, or the time limits that apply.

80. No one factor is determinative. The decision is not a simple one. It appeared to me taking account of all the circumstances that the balance of hardship and prejudice favoured the refusal of the application to amend in relation to claims two and three on the protected characteristic of pregnancy. The prejudice to the claimants is that they would be unable to pursue two new and separate discrimination claims, but not the whole claim as the respondents do not seek to strike out the first claim, and I address those claims on the protected characteristic of race two which I turn. It is a claim that is separate to that for race, it is on the face of it out of time by a considerable period, and it appears to me not just and equitable to hold it within the terms of section 123. That is not determinative but is I consider a strong factor. There is no causative link with the Claim Form, it is an entirely new claim, and one where there is hardship on the respondent in having to investigate and defend both an entirely new claim and one that is substantially out of time. I consider that it is in the interests of justice to refuse the application to amend in that regard.

81. The position is I consider different for the claims made on the protected characteristic of race. The claim is one of direct discrimination, as it was in the Claim Form, even if the clarity required for that claim was missing. There is I consider a risk of prejudice to the respondent in seeking to defend claims on facts that are now well over a year old, and will be over two years old when coming to a Final Hearing. The facts from the second and third claims might however be relevant to the issue of direct discrimination on grounds of race such that that evidence may be relevant to claim one. I consider that it is appropriate to allow the amendment in the circumstances of the present case and to reserve whether or not claims two and three as discrete claims are within the jurisdiction of the Tribunal for determination after hearing evidence, following the ***Galilee*** authority and the analysis above.

82. Whilst the balance to be struck is a fine one, in all the circumstances I considered it in the interests of justice to grant the application to amend in respect of claim one, which is not opposed, and for claims two and three on the protected characteristic of race reserving issues of jurisdiction, but to refuse it on the protected characteristic of pregnancy.

Conclusion

83. The application for amendment is granted in so far as unopposed and granted in part, on the protected characteristic of race. That may not render the application for strike out unnecessary, and the respondent can consider whether to make such an application having read this Judgment. I have also in it referred to authorities not commented on in submission, and if either party considers that it has suffered prejudice as a result it may seek a reconsideration of this Judgment under Rules 70 and 71.

Further procedure

84. There shall be a closed Preliminary Hearing for purposes of case management, to be arranged separately and to be heard by telephone. It is anticipated that that will only involve the parties' representatives and that a translator is not required for that hearing, but if there is a contrary view that can be intimated to the Tribunal by email.

85. In the meantime the parties are encouraged to seek to finalise the draft list of issues, discuss the appropriate case management orders that might be made, and seek to agree a Statement of Agreed Facts so that oral evidence can concentrate on issues of fact that are disputed. That may include the issue of whether jurisdiction should be considered at the Final Hearing or specifically at a further open Preliminary Hearing.

Employment Judge: Sandy Kemp
Date of Judgment: 20 October 2021
Entered in register: 11 November 2021
and copied to parties