EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107789/2020

Held by Cloud Video Platform (CVP) on 1 and 2 December 2021

Employment Judge P O'Donnell
Tribunal Member A H Perriam
Tribunal Member R Martin

Ms C Rolandi	**Claimant** **Represented by:** **Mr Brien, Counsel** **Instructed by Broudie, Jackson, Canter**
Crieff Hydro Ltd	**Respondent** **Represented by:** **Mr McGuire, Counsel** **Instructed by Rradar**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:-

1. The Tribunal grants the respondent's application to lodge a second supplementary bundle.

2. The Tribunal allows the claimant's application to amend her ET1 to add the claim of victimisation subject to the caveat that the issue of whether this claim has been lodged in time and, if not, whether to exercise its discretion to hear the claim out of time is reserved to be determined at the final hearing.

3. The respondent's application to adjourn the hearing is granted.

4. The Tribunal allows the claimant's application to admit the witness statement of Vanessa Linders subject to the caveat that the Tribunal has come to no view on the relevance, credibility, reliability or weight to be given to that statement which will be a matter to be addressed in submissions once all the evidence has been heard.

5. The Tribunal made the following directions for the preparation for the continued hearing:-

    a. No later than 7 January 2022, the respondent will lodge their response to the victimisation claim.

    b. No later than 28 days after that the respondent will provide to the claimant any supplementary witness statements and documents they seek to rely on in response to the victimisation claim and in response to the witness statement from Ms Linders.

    c. These supplementary documents and statements will be lodged with the Tribunal no later than 7 days before the continued hearing.

6. The continued final hearing was listed for 19 to 22 April 2022.

REASONS

Introduction

1. The claimant has brought various complaints of disability discrimination under the Equality Act 2010 against the respondent which are resisted by them. This hearing was listed as a final hearing to determine these claims.

2. At the outset of the hearing, it was clear to the Tribunal that there were a number of preliminary issues which had to be resolved before the hearing could proceed. Both Counsel were in agreement with this.

3. The issues to be resolved were:-

a. An application by the respondent to add an additional document in what was described as a "second supplementary bundle". There was no objection to this and so the Tribunal allowed this document to be added.

b. An application made by the claimant on 29 November 2021 to amend the ET1 to add a claim of victimisation. This was opposed by the respondent.

c. In the event that the application to amend was allowed, the respondent made an application to adjourn the hearing to allow it to prepare its defence to the new claim of victimisation.

d. An application by the claimant to admit a further witness statement into evidence from a witness who would not be attending the present hearing. This was opposed by the respondent.

4. The Tribunal was of the view that the terms of the amendment needed to be specified before it could be properly considered; it was stated that a claim of victimisation under s27 of the Equality Act was being pursued and the existing claims were said to be the protected act but it was not clear what it was which the claimant said amounted to victimisation; there were references to paragraphs in the claimant's primary witness statement and supplementary witness statement prepared specifically in relation to the victimisation claim (which the Tribunal had not read) but the Tribunal did not consider that it was for it or the respondent to try to guess the basis of the claim from these statements and, rather, it was for the claimant to set out her case.

5. Mr Brien accepted that there needed to be a proper specification and so a short adjournment was allowed for the amendment to be drafted and lodged with the Tribunal (copied to the respondent's agent). The Tribunal then heard submissions from both sides on the opposed applications set out above.

6. The Tribunal deliberated on the morning of the second day of the hearing and gave its oral judgment in the afternoon. By agreement with the parties, the oral judgment indicated whether the applications were granted or not

but did not give full reasons at the time with these to follow in writing. This judgment are those written reasons.

Claimant's submissions

7. Mr Brien opened his submissions by setting out a summary of the victimisation claim which the claimant now sought to bring; she alleges that, as a result of bringing the present claim, the respondent either disposed of her belongings, failed to store them safely, failed to search thoroughly for them or failed to return them to her.

8. He made reference to the case of *Selkent* (below) and the various factors which the Tribunal have to take into account.

9. Reference was made to the terms of the proposed amendment for a chronology of this issue. In particular, it was submitted that the correspondence between the parties showed that it was not until very recently that it became clear that the respondent would not be returning the claimant's belongings; on 15 November was the first time it had been said that the belongings had been discarded; on 19 November, the respondent stated that they would undertake a further search for these items and, on 26 November, it was confirmed that they could not be found; the application to amend was made on the next working day, 29 November 2021. In these circumstances, the claim could not have been brought sooner (and may have been criticised as being premature if it was) and was brought promptly.

10. Mr Brien accepted that the amendment was a new cause of action but submitted that it was one which arose from the same set of facts being concerned with the claimant being required to vacate her accommodation and would involve the same witnesses.

11. The new claim only arose after the ET1 was lodged and if the claimant had sought to raise by way of a new ET1 then there may be issues raised by the respondent regarding abuse of process and the *Henderson v Henderson* principle that all claims arising from the same set of facts should be dealt with in the same proceedings.

12. In relation to the issue of time limits, it was submitted that these only ran from 15 November 2021 when the claimant became aware that her

belongings would not be returned. The claim was made promptly once she was aware of this.

13. The items in question are of significant financial and sentimental value.

14. It was submitted that the balancing exercise which the Tribunal had to do in dealing with the application fell in favour of the claimant. If the application was not allowed then the claimant would then need to issue a fresh claim which would involve additional proceedings with cost and delay flowing from that. The application should, therefore, be allowed.

15. In relation to the respondent's application for an adjournment if the amendment is allowed, Mr Brien did not seek to argue against this. Although one of the respondent's witnesses touch on these issues in her witness statement it was not in the context of answering a formal claim. It would be proportionate to deal with all the claims together.

16. In relation to the additional witness statement, this relates to a witness who now resides in New Zealand and there had been difficulty contacting her which is why the statement has been lodged late.

17. It was accepted by Mr Brien that the statement does not speak directly to the facts of the claimant's case but sheds light on how the respondent deals with staff and may be relevant to the question of the reasonableness of any proposed adjustments. The evidence is, therefore, submitted to be relevant.

18. In terms of the weight to be given to the statement if the witness does not attend the hearing to be cross-examined then this will be a matter for the Tribunal.

19. In response to a question from the Judge, Mr Brien, and Mr McGuire for the respondent, agreed that the Tribunal should read the additional witness statement in order to be aware of what it said in assessing its relevance. Both Counsel were content that, if the application to admit the statement was refused, the Tribunal would be able to disregard the contents of the statement.

20. In rebuttal of the respondent's submissions, Mr Brien made reference to paragraph 8 of the proposed amendment which relates to a message to the claimant that is produced in the joint bundle at p254. He submitted that it must be inferred from this that the respondent had been telling the claimant that her belongings were available for collection until the later messages confirmed they were not.

21. The Judge asked Mr Brien (and Mr McGuire) whether s123(4) of the Equality Act assisted on the issue of time bar. Mr McGuire did not consider that it assisted the claimant if she was saying that her belongings were not returned given that she was aware of this earlier. Mr Brien considered that it might assist but that this section was more applicable to the claim relating to the duty to make reasonable adjustments. The primary detriment for the victimisation claim occurred on 15 November when the claimant was told that her belongings had been discarded.

Respondent's submissions

22. Mr McGuire also made reference to the *Selkent* factors and noted that it was conceded that the amendment was a new cause of action. He differed on the question of whether the new claim arose out of the same facts and submitted that it did not arise from the same facts as already pled.

23. In terms of time limits, it was submitted that the new claim was out of time. The detriment relied on was that certain belongings were not returned to the claimant; she left the accommodation provided by the respondent in October 2020 and her belongings were not returned. A reasonable assessment of when the time limit ran showed that the claim was out of time.

24. It was submitted that the Tribunal may feel the need for there to be evidence heard on the time limit issue and he referred to the case of *Galilee v Commissioner of the Police of the Metropolis* [2018] ICR 634 as support for the proposition that the Tribunal could allow the amendment subject to the issue of time limits being decided upon as an issue at the full hearing.

25. In response to a question from the Judge about when the respondent said any time limit ran, Mr McGuire accepted that this was difficult given that the

claimant was aware that her belongings had not been returned before the recent correspondence confirming that they could not be found. It was for this reason that he had raised the *Galilee* case although it was his primary position that the new claim was out of time.

26. In terms of the timing and manner of the application, it was submitted that this was extremely late with the terms of the amendment only being seen on the day of the hearing although it was accepted that this was not a bar to granting the amendment in itself.

27. However, there was a prejudice to the respondent as the amendment refers to various employees and former employees of the respondent to whom it will have to speak. Witness statements will need to be produced for the relevant witnesses.

28. If the amendment is allowed then the hearing will have to be adjourned which would reduce the prejudice but not avoid it as it is not clear whether it will be possible to contact any former employees and whether they would give evidence.

29. In relation to the additional witness statement, it was submitted that this was completely irrelevant to the issues before the Tribunal and was an attempt to sling mud at one of the respondent's witnesses. The claimant's witness was not a witness to any of the allegations and adds nothing.

30. There is a prejudice to the respondent in this evidence being admitted. The witness will not be attending the hearing and so little weight should be given to what it says.

Relevant Law

31. Section Rule 34 of the Employment Tribunal Rules of Procedure provides as follows:-

> *The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of*

justice to have determined in the proceedings; and may remove any party apparently wrongly included.

32. In addition to this specific provision, the Tribunal has a general power to make case management orders which includes the power to allow amendments to a claim or response in terms of Rule 29.

33. The case of *Selkent Bus Co Ltd v Moore* [1996] ICR 836 confirms the Tribunal's power to amend is a matter of judicial discretion taking into account all relevant factors and balancing the injustice and hardship to both parties in either allowing or refusing the amendment. The case identifies three particular factors that the Tribunal should bear in mind when exercising this discretion; the nature of the amendment; the applicability of any time limits; the timing and manner of the amendment.

34. In relation to time limits, the case of *Transport and General Workers Union v Safeway Stores Ltd* UKEAT/0092/07 confirms that this is a relevant factor in the Tribunal's discretion and can be the determining factor. However, time bar does not apply, in the context of an application to amend an existing claim, to automatically bar a new cause of action in the same way as it would if the new cause of action was being presented by way of a fresh ET1.

Decision – Application to amend

35. The Tribunal considers that it is appropriate to address each of the specific factors highlighted in *Selkent*, consider any other relevant factors and then take all of those into account in balancing the injustice and hardship to all sides.

36. First, there is the nature of the amendment itself which is to add a claim of victimisation to the existing claims of discrimination arising from disability, harassment and breach of the duty to make reasonable adjustments.

37. In this regard, the nature of the amendment is one that clearly seeks to raise a new cause of action and this is common ground between the parties. The Tribunal agrees with Mr McGuire that this not a new cause of action which arises from the same set of facts; the claimant is offering to prove an entirely

new set of facts in the victimisation claim from those which she is offering to prove in the original claims.

38. There may be a link between the two factual matrices given that the issue with the claimant's belongings could potentially be said to be a consequence of the events giving rise to the original claims but that does not mean they are the same set of facts.

39. It does mean that the respondent would need to call evidence from new witnesses or additional evidence from their existing witnesses to meet the new claim. It is not the case that the evidence which the Tribunal would have heard from the existing witnesses for the original claims would be sufficient for it to make relevant findings of fact in the victimisation claim.

40. Second, there is the issue of the applicability of time limits and, given that the amendment seeks to raise a new cause of action, this is a relevant factor. However, the Tribunal does bear in mind that this is only a factor and not determinative.

41. This was not a case where parties were agreed as to the date on which the time limit started and the Tribunal did not consider that it was possible to come to a decision on this without hearing evidence, particularly from the respondent's witnesses.

42. The Tribunal certainly does not consider that, as submitted by Mr Brien, the time limit only ran from 15 November 2021 when the claimant became aware that her belongings were said to have been discarded. The caselaw is very clear that an act of discrimination occurs when it is done and not when the claimant learns of it (*Mensah v Royal College of Midwives* EAT/124/94; *Virdi v Commissioner of Police of the Metropolis* [2007] IRLR 24).

43. However, when the claimant became aware of the issue is highly relevant to the Tribunal's discretion to hear a claim out of time in terms of s123 of the Equality Act and this also has to be taken into account as part of the *Selkent* factors.

44. In these circumstances, the Tribunal does consider that if it the amendment is allowed then this would be subject to the caveat, in terms of *Galilee*, that

the issue of time bar and any exercise of the Tribunal's discretion to hear the claim out of time will be issues to be determined as part of the final hearing once all the relevant evidence has been heard.

45. Third, there is the factor as to the timing and manner of the application. There was no question that this was made very shortly before the hearing. The Tribunal does accept that there was an explanation why the application had not been made prior to 15 November; prior to that date there was no indication that the claimant's belongings would not be returned to her and so there was no detriment on which to base a victimisation claim.

46. It was possible for the application to have been made sooner than it was after 15 November but only by a very short period and it was unlikely that the application could have been dealt with before this hearing.

47. In any event, there was still ongoing correspondence between the parties up to 26 November before a definitive position was confirmed and the Tribunal does note that the application was made the very next working day. The claimant did, therefore, act promptly once the position was clear.

48. The Tribunal also notes that the claimant could have sought to raise the new claim by way of an ET1 and by seeking to amend the existing claim she has avoided the delay and cost that would be involved for all parties in an entirely new set of proceedings. It means that all the claims are capable of being addressed in the same proceedings.

49. Having addressed the specific factors identified in *Selkent*, the Tribunal considered whether there were any other relevant factors and could not identify any other relevant factor.

50. Turning to the balance of injustice and hardship between the parties, the Tribunal considered that there would be a significant injustice and hardship to the claimant in refusing the application as this would prevent her from pursuing a potentially valuable claim as part of these proceedings.

51. As noted above, the claimant could lodge the victimisation claim by way of a fresh ET1 but this would involve a new Tribunal process with costs and delay for all parties.

52. The Tribunal does accept that the respondent may consider that there is a hardship in that they now have to deal with a claim (and face a liability) that they did not previously. They will also face having to interview further witnesses in order to defend the claim.

53. However, the Tribunal does not consider that this is a significant enough hardship to outweigh the prejudice to the claimant; the respondent would face the same circumstances if the claimant lodged a new ET1; the respondent has the opportunity to defend the claim given the Tribunal's decision on the adjournment application below.

54. The Tribunal does accept that the respondent may face a prejudice in defending the claim if they cannot contact relevant witnesses who have left their employment. Again, however, the same would arise if the victimisation claim had been raised by way of a fresh ET1.

55. Further, the ability of the respondent to contact witnesses is a relevant factor in the exercise of the Tribunal's discretion to hear a claim out of time and, as set out above, this issue will be determined at the final hearing. The respondent, if they have faced any difficulty in obtaining evidence, is not deprived of the ability to rely on this in any limitation argument.

56. The Tribunal considers that, although there may be some injustice and hardship to the respondent in allowing the amendment, this does not outweigh the hardship and injustice to the claimant in refusing it.

57. In these circumstances, taking account of all the matters set out above, the Tribunal allows the claimant's application to amend her ET1 to add the claim of victimisation subject to the caveat that the issue of whether this claim has been lodged in time and, if not, whether to exercise its discretion to hear the claim out of time is reserved to be determined at the final hearing.

Decision - Adjournment

58. The Tribunal considered that it was in keeping with the overriding objective and the interests of justice for the respondent to be given the time to respond to the victimisation claim and prepare to defend it. Mr Brien did not attempt to argue otherwise on behalf of the claimant.

59. In these circumstances, the respondent's application to adjourn the hearing is granted.

Decision – Additional Witness Statement

60. The Tribunal agrees with the submission made on behalf of the respondent (which was not disputed by Mr Brien) that the evidence contained in the statement does not speak directly to the matters giving rise to the claim.

61. However, the Tribunal also bears in mind that, in discrimination cases, it is often the case that the Tribunal needs to consider what inferences it can draw from the evidence before it and that discrimination can often be unconscious. In these circumstances, it can be relevant to consider how others were, or were not, treated. It cannot, therefore, be said that the evidence in the witness statement is entirely irrelevant.

62. The Tribunal should be clear that it has come to no view on the relevance of the evidence in the statement and it can only do so once it has heard all the evidence.

63. If it had been the case that the final hearing had been proceeding at the present date then the Tribunal considers that this would have weighed heavily against admitting the statement because the respondent would have little or no notice of it and be prejudiced in their ability to counter it.

64. However, the adjournment which the Tribunal has granted will allow the respondent to investigate the matter and produce evidence to counter what it is said.

65. The absence of the witness for cross-examination is likely to mean that little or no weight is given to the statement but that is a matter to be addressed in submissions after all the evidence has been heard.

66. The Tribunal, therefore, allows the claimant's application to admit the witness statement of Vanessa Linders subject to the caveat that the Tribunal has come to no view on the relevance, credibility, reliability or weight to be given to that statement which will be a matter to be addressed in submissions once all the evidence has been heard.

Further directions & continued dates of hearing

67. The Tribunal made the following directions for the preparation for the continued hearing:-

    a. No later than 7 January 2022, the respondent will lodge their response to the victimisation claim.

    b. No later than 28 days after that the respondent will provide to the claimant any supplementary witness statements and documents they seek to rely on in response to the victimisation claim and in response to the witness statement from Ms Linders.

    c. These supplementary documents and statements will be lodged with the Tribunal no later than 7 days before the continued hearing.

68. It was agreed the 4 days would be required for the continued hearing.

69. The continued final hearing was listed for 19 to 22 April 2022.

Postscript

70. At the end of the hearing, Mr McGuire indicated that the respondent would intend to make an expenses application in relation to the adjournment of the hearing. This will be reserved until the final judgment is issued.

Employment Judge: **P O'Donnell**
Date of Judgment: **14 December 2021**
Date sent to parties: **14 December 2021**