



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107639/2019**

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**Held in Glasgow on 12 November 2019**

**Employment Judge L Doherty**

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**Mr J Rogerson**

**Claimant  
Represented by:  
Ms S Martin -  
Friend**

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**Parkstone Hotel Ltd**

**Respondent  
Represented by:  
Mr E Ronald -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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

**REASONS**

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1. The claimant presented a claim to the Employment Tribunal on 10 July 2019, claiming unauthorised deduction of wages, and failure to pay holiday pay. The claim was resisted, and a hearing was fixed for 25 September 2019 to determine the claim. At that hearing the Tribunal ordered that the hearing be postponed, and it allowed time for the claimant's representative to make an application to amend the claim. It was noted by the tribunal at that time that the amendment was to include a complaint of constructive unfair dismissal.

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2. The claimant does not have sufficient qualifying service to bring a complaint of unfair dismissal.

**E.T. Z4 (WR)**

3. The claimant wrote to the tribunal on 1 October 2019 with his proposed application to amend, which identified a claim constructive unfair dismissal, and a complaint of discrimination on the grounds of sex. The respondent responded to that resisting the application, in an email of the same date. This hearing was fixed to consider whether the claimant's application to amend should be allowed.
4. The claimant attended the hearing represented by Mrs Martin, a friend, and the respondents were represented by their one of the directors, Mr Derek Ronald.
5. The issues which the Tribunal has to consider in determining the application were explained to the parties.
6. It is accepted by the claimant that he was employed by the respondents for a period of less than two years, and therefore does not have the relevant qualifying's service to present a complaint of constructive unfair dismissal under section 94 of the Employment Rights Act. It was confirmed with the claimant that the amendment is therefore seeking only to include a claim of discrimination on the grounds of sex under the Equality Act 2010.
7. The claimant give evidence, and from the evidence and information before the Tribunal made the following findings in fact.

#### 20 Findings in Fact

8. The claimant, whose date of birth is 11 June 1996 was employed by the respondents from 22 November 2018 to 13 May 2019, latterly in the role of trainee duty manager. The claimant completed a medical questionnaire at the commencement of employment, in which he confirmed that he did not have any mental health difficulties.
9. The claimant tendered his resignation from the respondent's employment in in March 2019 but withdrew it thereafter.
10. The claimant subsequently tendered his resignation from his employment in May 2019, his employment terminating on 13 May 2019.

11. The claimant consulted with his GP regarding his mental health in around May 2018 and was directed towards self-help literature.
12. The claimant contacted ACAS approximately one week of his employment coming to an end regarding a claim against the respondent's. The date of receipt of ACAS certificate was 22 May, and the certificate was issued on 22 June 2019, and the claimant presented a claim, claiming holiday pay, and other payments, to the tribunal on 10 July 2019. The ET1 specified that the claimant had not been paid holiday pay and give a breakdown of the amount of holiday pay the claimant was claiming, together with a breakdown of monies which the claimant said he was due for hours worked for which he had not been paid.
13. The claimant was aware of the existence of ACAS as an independent body which could assist on employment matters, and he was aware of the existence of employment tribunals, and the ability of an employee to present claims about matter arising from employment to an employment tribunal, including claims of discrimination. The claimant carried some online research regarding presenting a claim. He had however no prior experience of presenting a claim to the employment tribunal.
14. In September 2019 Mrs Martin was added to the employment tribunal record as being the claimant's representative. Prior the hearing on 25<sup>th</sup> September the claimant had given Mrs Martin all of his evidence that he wished to rely on. Mrs Martin appeared with the claimant at the hearing which had been on 25 September. Further to that hearing the claimant withdrew his complaint of an authorised reduction of wages and the holiday pay. The tribunal allowed time at that hearing for the claimant to consider if he wished to make an application to amend his claim to include a complaint of constructive dismissal.
15. At no point prior to the intimation of the application to amend has the claimant made a complaint of discrimination.

16. One of the issues the Tribunal has to consider in its determination of this application is whether time should be extended on the grounds of justice and equity to consider a new claim. Mrs Martin submitted that the reason why the claimant had been unable to present his claim of discrimination on time was because he had mental health issues, which were caused by the discrimination he was subjected to in the course of his employment, and he found it difficult to speak about these.
17. The claimant give evidence to the effect that he did not tell anyone about the discrimination he had suffered, and his mental health had suffered. He said that he consulted his GP in May 2018 because of his mental health, and he said he was directed towards self-help literature. The claimant also said that he only became aware that he could present a claim of discrimination on the evening before the tribunal hearing of 25 September, but that he understood by that stage the claim was time-barred. He also said he only became aware he could claim discrimination when he was told he could do so by the Employment Judge, at the hearing on 25 September. He said he had carried out some online research and he accepted he was aware of the existence of employment tribunals and of the right to bring a claim of non-payment of wages/holiday pay.
18. On balance the tribunal did not find credible the claimant's assertion that he was unable to present a complaint of discrimination in time because his mental health difficulties prevented him from addressing this. The claimant produced no medical evidence to support his contention that his mental health suffered because of discrimination he was subjected to in the workplace. Nor did he produce any medical evidence to support the contention that his health impacted on his ability to present a complaint of discrimination. His evidence was confined to the fact that he attended his GP complaining of mental health difficulties in May 2018 and had been directed to self-help literature.
19. The claimant was able to contact ACAS very shortly after his employment came to an end and to pursue a claim against the respondents, which is inconsistent with the notion that he was prevented on the grounds of his health from taking action against his employer.

20. Furthermore, the tribunal was satisfied that the claimant was aware of the existence of Employment Tribunals, and the right to present a complaint to a Tribunal about issues arising from employment, including discrimination claims. The claimant gave inconsistent evidence as to when became aware  
5 that a complaint of discrimination could be presented, saying initially that it was the evening before the hearing of 25 September, but also saying he only became aware of the ability to present such a complaint when the Employment Judge mentioned it in the course of the hearing. The claimant said in his evidence that he was completely 'clueless\*' about bringing claims,  
10 however that evidence was inconsistent with the fact that he contacted ACAS promptly after his employment came to an end and pursued a claim for unpaid wages, and hours of work which it was said he was not paid for and that he gave considerable specification of this in this ET1.

### **Submissions**

#### *Claimant's submissions*

21. Mrs Martin for the claimant submitted that this was a difficult case. The claimant was a young man and it was very difficult for him to open up about what had happened to him, and to present a complaint to the employment tribunal about this. The claimant had suffered from mental health problems  
20 because of discrimination. The claimant did not know he could claim for discrimination, and it was when he brought his evidence to Mrs Martin that she identified that may have been a claim for discrimination.

22. Mrs Martin submitted that the claimant was prevented from bringing his claimant time because of his mental health difficulties caused by the  
25 discrimination.

#### *Respondent's submissions*

23. Mr Ronald for the respondent submitted that there had been no discrimination. He did not accept that the claimant was prevented from presenting a claim because of mental health issues caused by discrimination. Mr Ronald pointed  
30 to the fact that the claimant had resigned but withdrawn his resignation, and

his ability to contact ACAS and pursue a claim after his employment came to an end.

### Consideration

24. In considering whether to allow an application to amend the Tribunal has to carry out a careful balancing exercise of all relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment.
25. The starting point for the tribunal's consideration of an application to amend is the guidance given in the case of *Selkent Bus Co Ltd v Moore* 1996 ICR 836 EAT.
26. In that case the EAT explained that the relevant factors which the tribunal should take into account would include the nature of the amendment, the applicability of time limits, and the timing and manner of the application.
27. The tribunal began by considering the nature of the proposed amendment. Amendments range from the correction of small mistakes, to the relabelling of claims already pled, to the addition of entirely new claims which add a different cause of action.
28. The tribunal was satisfied that this application to amend is one which seeks to include an entirely new cause of action, which is unconnected in any way to claim originally lodged. The original ET 1 identified a claim for non-payment of holiday pay, and payment for hours worked but not paid for. There is no suggestion in any part of the ET 1 that what was being presented was a claim of discrimination under the Equality Act. The amendment seeks to include allegations of matters which are not prefigured in the original claim, and which would involve the tribunal in enquiry of matters which have not been foreshadowed in the original claim, and it therefore constitutes a new claim.
29. That being the case the tribunal has to consider whether the complaint is out of time, and if it is out of time, to consider where the time limit should be extended under the applicable statutory provisions.

30. The applicable statutory provision is contained in a Section 123 of the Equality Act which provides;

(1) *Proceedings on a complaint within section 120 may not be brought after the end of-*

5 (a) *the period of three months starting with the date of the act to which the complaint relates, or*

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

31. The application to amend was presented on 1 October 2019. The claimant's  
10 employment came to an end on 13 May, and even allowing for the extension of time created by the issue of ACAS certificate, which was presented on 22<sup>nd</sup> May and issued on 22<sup>nd</sup> June, the proposed claim is still out of time.

32. Tribunals have a wide discretion to allow an extension of time under the just and equitable test in Section 123 of the Equality Act, however the onus is on  
15 the claimant to convince the tribunal that it is just and equitable to extend the time limit.

33. In considering whether time should be extended, the tribunal considered the prejudice which each party would suffer as a result of allowing or refusing an extension of time which, having regard to all the circumstances of the case,  
20 including the length of the delay and the reason for it, the extent to which the cogency of evidence like to be affected by the delay, the extent to which the party sued cooperated with request information, the promptness with which the claimant acted once here he knew of the facts which give rise to the complaint to take appropriate advice, and the steps taken by the claimant to  
25 obtain appropriate advice once here she knew of the possibility of taking action.

34. There is a delay in this case, which although not insignificant, is not extensive. For the reasons given above, the tribunal was not persuaded that the reason for the claimant failing to lodge the claim in time was because of his mental  
30 health difficulties as a result of discrimination, and the tribunal did not

conclude that there was any reason for the failure to present the claim on time. The tribunal was satisfied that the claimant was aware of the matters on which he wished to rely when he left his employment. It was also satisfied the claimant had taken steps to investigate the possibility of bringing a complaint, and in fact he had done so. He had carried out on line research and had contacted ACAS. There is no suggestion that the respondents were asked for information which they refused to provide. The claimant had not taken any steps to obtain legal advice. It is not likely that the cogency of evidence will be materially affected by the length of the delay in this case. The tribunal was not persuaded that the claimant did not discover until 25th of September that a complaint of discrimination could be presented to an employment tribunal. The notion that this is the case is entirely inconsistent with the claimant having conducted research online and having contact ACAS at an early stage.

35. The tribunal considered the prejudice of each party will suffer, as a result of refusing or allowing the application. The prejudice which the claimant will suffer if the application is refused is that he will be unable to pursue his claim of sex discrimination. The prejudice which the respondents will suffer is that they will put to the expense and delay of dealing with a claim which has been lodged late, and which is likely to require further specification.

36. The tribunal considered the balance of prejudice having regard to the relevant factors in this case. While there are elements which support an extension of time such as the relative length of the delay, and the fact that the cogency of the evidence is not likely to be affected by the extent of the delay, there are other elements which weigh against it. The tribunal was not persuaded that there was a reason for the delay, nor did the tribunal did not accept the claimant was unaware of the right to present a complaint of discrimination. The Tribunal also take into account the additional time and cost which the inclusion of this claim will occasion for the respondents in that if the amendment is allowed, they will be facing a discrimination claim which is likely to involve a hearing of some length and be costly. Balancing these factors and taking into account that the onus rests with the claimant to convince the Tribunal that time should be extended, the Tribunal was not satisfied that time



should be extended under section 123 (1) (b) of the Equality Act to consider the claim.

37. That is not the end of the matter, as in considering an application to amend the tribunal also has to consider the timing and manner of the application. In  
5 considering this the tribunal considered why the application had been made at the stage which had been made, and why was not made earlier, and whether the amendment if allowed it would cause additional costs and delay, and if it will put the respondents in a position where evidence relevant to the new issues is no longer available or is rendered of a lesser quality than would  
10 have been earlier.
38. On this last point there was nothing before the tribunal to suggest that the delay would impact on the quality of the evidence. As indicated above, the tribunal did not conclude there was any reason why the application was not  
15 made earlier. Nor was it explained why a claim of sex discrimination was made in October, as at the hearing in September, by which point the claimant said Mrs Martin had all his evidence, it was identified that the amendment would be one to include a claim of unfair dismissal.
39. The tribunal was satisfied that allowing the amendment will result in delay and additional costs. It is likely that the claim will require further specification; the  
20 respondents will be required to answer it; and it is likely that a hearing of some length may be required, with the attendant delay and costs of that .
40. The tribunal considered all of these factors, and thereafter carried a balancing exercise, having regard to the interests of justice and the relative hardship that would be caused to the parties by granting or refusing the application to  
25 amend.
41. The tribunal in conducting this exercise take into account the hardship to the claimant in that he will be denied the opportunity pushing his complaint of  
30 discrimination. Against that it balances the hardship to the respondents who have already faced a claim of failure to pay holiday pay, and unauthorised deduction of wages, and having dealt with those claims, and those claims having been withdrawn, will now be faced with a claim for discrimination which

had not been prefigured in the ET1 and which is likely to occasion them considerable expense and delay.

- 5 42. On balance in this case the tribunal was satisfied that the prejudice to the respondents in granting the application is likely to outweigh the prejudice the claimant, and therefore the application is refused.

10 Employment Judge: L Doherty  
Date of Judgment: 13 November 2019  
Entered in register: 14 November 2019  
and copied to parties

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