EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4106063/2015

Held in Glasgow on 28 October 2019

Employment Judge: R Sorrell

Ms L M Malone	**Claimant** **In Person**
Scottish Ministers	**Respondent** **Represented by:** **Ms L Meldrum - Solicitor**

PRELIMINARY HEARING
JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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

REASONS

1 The claimant lodged a claim of unfair dismissal on 23 March 2015.

2 There has been considerable procedural history in the case, the most recent Preliminary Hearing having taken place on 5 August 2019. At that Hearing

Judge McFatridge made various Orders dated 6 August 2019 so as to allow the claim to be progressed.

3 One of these Orders was that within 28 days the claimant shall, if so advised, lodge her application to amend the claim with the Tribunal to include a claim of disability discrimination. Judge McFatridge further stated that any such application should clearly set out the nature of the claims being made including details of the alleged disability, a note of those sections of the Equality Act 2010 on which the claimant seeks to rely, full details of all incidents on which the claimant seeks to rely, the nature of any provision criterion or practice which is alleged to put either the claimant or those sharing her particular disability at the particular disadvantage and details of any alleged reasonable adjustments which it is alleged the respondent was under a duty to provide. Further, that the respondent shall have 14 days from the date of submission of such application to advise whether or not they object to the amendment.

4 On 3 September 2019 the claimant lodged a written application to amend her claim. On 11 September 2019 the respondent lodged their written objections to the application. This Hearing has therefore been scheduled for parties to make oral submissions in respect to this application in order for the Tribunal to determine whether it should be allowed.

5 As the claimant is unrepresented, the procedure for this Hearing was explained to her. It was clear from the onset of these proceedings that the claimant was visibly distressed and I therefore advised her that breaks during proceedings could be taken if that would assist.

6 I informed parties that submissions would be heard from both parties and that in the event I allowed the claimant's application, it would be subject to time bar which would be considered as part of the evidence at the Final hearing in accordance with the authority of *Galilee v Commissioner of Police of the Metropolis [2017] WL05639353 [2017].*

7 The respondent lodged a joint bundle of productions and a bundle of authorities.

8 The claimant's application to amend her claim dated 3 September 201 9 stated as follows:-

> "I wish to amend my claim for unfair dismissal to include a disability discrimination claim as I believe I had a disability in terms of the Equality Act 2010. In making this request, I rely on the following:
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> In November 2001, 1had a prior incident of stress at work which resulted in my absence from work and was supported by a medical certificate tendered to CORPS. They were alerted at that stage that I had succumbed to stress at work and should have borne this in mind in their subsequent dealings with me. They did not.
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> Forward to 2010, in the H&S Unit, where I complained about a team colleague's continued behaviour to me upon my arrival within the Unit; where I was vocal to team members of my unhappiness in the Unit due to lack of training, lack of supervision, lack of support and my resultant feelings of floundering given the specialist area of law all occasioned for the first time in 19 years of exemplary service and performance. My experiences were commonly shared within the Unit. All of this had a serious impact upon my personal life and functioning within my family. Realising this, I attempted to escape from the Unit by applying for other posts within COPFS. I was successful in my second attempt by appointment to the Forensic Gateway Unit (FGU) another specialist unit in November 2010. Initially I was relieved at the move though had some doubts about the staffing and work load of the FGU which relief continued when I was appointed Acting Principal Depute in a Solemn Unit in January - March 201 1 with both the expectation of and experience in.
>
> Forward to 201 1 and the FGU when I complained shortly on return there of staffing shortages, operating systems, volume of work and volume of liaising all of which placed an inordinate demand upon me at which point

my unrecognisable behaviour to me started. This behaviour was out with normal parameters. COPFS should have realised that I was on another path occasioned by stress, should have listened to my complaints and find a solution to them. They did not. COPFS offered me no support, COPFS chose to ignore my odd behaviour, COPFS did nothing to investigate my complaints (which latterly formed part of my grievance some of which was upheld) which complaints and odd behaviour was simultaneous. Instead COPFS chose to fully investigate the "theft of time" without considering that it was likely a symptom of an employee suffering in the work place because of her employer's excessive and continued demands upon her of which suffering they were alerted to by me and other employees. I was ill for the reasons alluded to. COPFS knew this. COPFS ignored this.

By the time I left my employment in February 2013, their conduct towards me from 2010 in the H&S Unit had made me suffer a mental impairment which continues to this day and which was operating when I submitted my application for unfair dismissal, without legal advice. It wasn't until June 2019, following advice from Strathclyde University Law Clinic, that I realised an amendment could and should be made by me to include disability discrimination.

As an aside, COPFS were told in July 2013 by Dr K Wladyslawska, Occupational Physician, that I had 'an impairment likely to be considered as a disability because it lasted longer than 12 months'.

I am grateful for consideration of my proposed amendment."

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(Pages 75 to 76 of the joint bundle of productions).

9 On 11 September 2019 the respondent replied to the claimant's application to amend her claim as follows :-

"We refer to the above matter in which we represent the Respondent. The Respondent objects to the claimant's application to amend her claim. The Respondent's objection is made on four principal grounds and it will

rely on the principles set out in *Selkent Bus Co Ltd (t/a Stagecoach Selkent) v Moore UKEAT/1 51/96:*

i. The nature of the amendment;

ii. The fact that the new cause is out of time;

iii. The timing of the application; and

iv. The fact that the claimant can still pursue her original claim.

The nature of the amendment

It is unclear what legislative provisions of the Equality Act 2010 the Claimant intends to include in an amended claim. The Claimant has outlined that she considers that she is disabled in terms of the Equality Act 2010 however does not specify what she considers this disability to be. The Respondent would need clarity of the exact mental impairment upon which the claimant is seeking to rely. Further, the Respondent has not been notified of the specification of the disability discrimination claims which the Claimant intends to make.

The averments contained within the Claimant's email dated 3 September 2019 go beyond the facts outlined in the ET1 form received by the Employment Tribunal on 23 March 2015. Accordingly, the Claimant's application to amend is more than a mere re-labelling of the existing claim, and would require additional facts to be added to the claim. Furthermore, the Respondent's position is that these new factual amendments, in so far as relevant to the dismissal proceedings, would have been within the Claimant's knowledge at the time of her dismissal and when she lodged her claim in 2015.

The new cause is out of time

The Claimant's employment ended on 18 December 2014. The time limit to present a claim under s.123(1) (a) of the Equality Act 2010 was 17 March 2015 (subject to any extension of time following mandatory ACAS

Early Conciliation). The Claimant's application to amend her claim was made on 3 September 2019, more than 4 years after the time limit for such an application. A disability discrimination claim is therefore well out of time. It is the respondent's position that the facts as originally pled could not, without addition or amendment, support the new claim. Indeed, it has been discussed at two Preliminary Hearings that the claimant's claim is one of unfair dismissal only. Reference is made *to Bryant v Housing Corporation [1998] EWCA Civ 866.* The Claimant did not identify at the time of presenting her claim that her alleged disability was relevant or that the Respondent had unlawfully discriminated against her in taking the decision to dismiss or otherwise. The Respondent's position is that it would not be just and equitable to allow the amendment.

The timing of the application

The Claimant submitted the ET1 on 23 March 2015. As outlined above, the Claimant's amendment application was made on 3 September 2019. The Claimant discussed at the Preliminary Hearing which took place on 1 April 2019 that she was considering an amendment to her claim to include a claim of disability discrimination. Employment Judge Doherty pointed out in paragraphs 10 to 12 of the Note following the Preliminary Hearing that any application to amend should be made without delay. The delay in making the application to amend is significant - being over 4 years since the presentation of the claim and 5 months since the Claimant first referred to her intention to make the application to amend. Additionally, in correspondence dated 1 May 2019, Employment Judge Meiklejohn requested that the Claimant confirmed by no later than 15 May 2019 whether she intended to amend her claim to include disability discrimination. The Claimant failed to do so.

The Claimant's application does not sufficiently outline the reasons for the delay other than to say that she submitted her claim for unfair dismissal without the benefit of legal advice. It should be borne in mind that the Claimant was a solicitor during her employment with the

Respondent and, whilst her area of practice was not employment law, she would have been familiar with methods of researching the legal position in so far as it related to her employment and its termination. The Claimant's lack of representation did not prevent her from stating her intention to claim unfair dismissal in ET1. The Respondent's position is that the Claimant had knowledge of all of the material facts to plead a claim for disability discrimination at the time of presenting the claim and chose not to do so.

In her application to amend the Claimant states: *"It wasn't until June 201 9, following advice from Strathclyde University Law Clinic, that I realised an amendment could and should be made by me to include disability discrimination".* The Claimant first referred to a potential amendment to include disability discrimination at the Preliminary Hearing on 1 April 2019 at which she advised that Strathclyde Law Clinic had advised her to seek to amend her claim to that effect. In an email to the Tribunal dated 26 March 2019 the Claimant stated that she had spoken to Strathclyde Law Clinic regarding her claim on 22 March 2019. Judge Doherty pointed out the Claimant in the Note issued after the Preliminary Hearing that an amendment application should be submitted without delay. The Respondent's position is that the Claimant has delayed too long in making the application for amendment in September 2019. The application should be refused.

Claimant can still pursue the original claim

Reference is made to *Selkent* where the EAT considered it relevant that the employee would not suffer significant hardship if leave to amend were refused as he was still entitled to pursue his original "ordinary" unfair dismissal claim (he had sought to amend his claim to add unfair dismissal on trade union grounds). In this case, should the Claimant's application to amend be refused, the Claimant could continue with her claim of unfair dismissal. Additionally, the Claimant has raised a Court of Session action in relation to her alleged personal injury by the Respondents and has

available recourse in that forum. Due to the nature of the contentions being made, the Respondent would suffer hardship as, not only may it require additional time to investigate, but it may also be necessary to call additional witnesses. If the amendment is allowed the Respondent is likely to incur additional costs as a result. Further, given the passage of time, the memory of potential witnesses for a disability discrimination claim are likely to have faded considerably.

It is submitted that the test for this Employment Tribunal in deciding whether to grant the Claimant's application to amend is multi-factorial - the Tribunal must take into account all of the circumstances leading to amendment being tabled and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, taking into account matters such as the nature of the amendment, and should crucially examine the applicability of time limits and the timing and the manner of the application.

For the reasons outlined above, it is the Respondent's position that the Claimant's application to amend the claim should be refused." (Pages 77 to 79 of the joint bundle of productions).

Oral Submissions

10 At the Hearing the claimant made oral submissions as follows:-

11 Her illness is real and can be confirmed by the psychiatric report from Dr Tilak. (Pages 81 to 100 of the joint bundle of productions). She currently has a personal injury claim ongoing in the Court of Session which will establish the cause of her illness. She should not be denied a remedy from this Tribunal because of her illness which has caused her to have a phobia regarding these proceedings. The Tribunal is also aware of her attempt to instruct a solicitor, If she succeeds in her claim in the Court of Session, then she will be able to instruct a lawyer in these proceedings. This amendment will not cause any hardship to the respondent as they are fully represented and do not have a mental illness.

12 She has a disability in terms of the Equality Act 2010 but she does not know which section applies to her circumstances. Dr Tilak has diagnosed her with Adjustment Disorder and Recurrent Depressive Disorder. These are the impairments that she relies upon in respect of her disability discrimination claim. At paragraph 8.9 of Dr Tilak's report, the Doctor is of the view that she is still suffering symptoms of Adjustment Disorder and that her fitness to participate in these proceedings is not absolute or ideal as she is likely to be made anxious by the very situation she is keen to participate in. Further, that in order for her to be best equipped to deal with this process it would be important that she is supported by someone knowledgeable about employment law to represent her.

13 She was discriminated against by the respondent because from 2011 she alerted the respondent to some of the difficulties she was having. They knew her behaviour was off but they didn't question her about it. This was in spite of her having an unblemished attendance record and a Box 2 appraisal, at which no point was she asked why she was behaving in the way she was. In April 2012 an email was sent by a senior Procurator Fiscal to Mr J Dunne, Head of the Procurator Fiscal Service, intimating that the claimant was not coping and that she was concerned about her and her workload and the need for greater resources. Nothing came of that email.

14 She only found out about the Equality Act 2010 when she sought assistance from Strathclyde Law Clinic. Here disability began when her alcohol levels increased in 2010. She became tearful going to work which she had never been previously. She didn't want to go to work but carried on because there were no other staff to do the job. She stopped going out and became focused on her work. Her capabilities as a mother lessened. She became irritable with her children. All she did was think about work. Her sleeping was disrupted. She went from being very happy in her work to being unable to cope. She lost interest in everything and stopped going swimming, cycling and going to the cinema. Her concentration at work was affected.

15 Her application to add a disability discrimination claim was not meant to be a re-labelling of the existing claim. Her claim is for unfair dismissal while she had a mental illness. Her claim was submitted without legal advice during her illness so she was mentally impaired. It was ACAS who advised her about the time limits to lodge her claim for unfair dismissal. She does not consider her amendment to her claim to be a new cause of action as it forms part of her existing unfair dismissal claim. She did not think about raising her mental health at all when she made her unfair dismissal claim. She did not lodge her application to amend until September 2019 due to her illness and her lack of knowledge. She isolated herself when she left her job and from all her friends who were criminal lawyers as she was too ill to speak to people. She remembers attending the Strathclyde Law Clinic on two occasions when they took her statement and she showed them her medical records. She did not know about being able to claim disability discrimination at the time she claimed unfair dismissal due to her lack of knowledge and her illness. There are days when she cannot think about anything and goes to her bed.

16 She does not consider that hardship would be caused to the respondent if her amendment were allowed as they have a raft of solicitors representing them. In terms of faded memories she does not agree as the witnesses that the respondent would call would be the same as those in the Court of Session case and the psychiatric reports are already written. The respondent ha$ unlimited resources and none of them are mentally ill.

17 If the application is refused she would suffer hardship in that there are a set of circumstances that are being used to the advantage of the respondent and to her disadvantage. She has not received any financial assistance in order to secure legal representation and she is suffering from a mental illness. She does not accept that she should be denied a remedy when she didn't know she could lodge a claim for disability discrimination at the time. Although she knows she would have to prove the issue of disability, she would rely on the same facts for the disability discrimination claim as for the unfair dismissal claim because it is those facts that have made her ill while she was at work. Time should not be so important she is an individual with an enduring mental

illness. Why would she choose not to include a claim of disability discrimination at the time she lodged her unfair dismissal claim. It doesn't make sense other than because of her lack of knowledge and her mental illness.

18 In response to the claimant, the respondent made oral submissions as follows :-

19 The claimant lodged her ET1 claim form on 23 March 2015. She ticked the unfair dismissal box only. There was no claim for disability discrimination under Section 8.2 of the claim form, nor any reference to it and no facts relating to it can be deduced. The e-mails lodged at pages 39 to 44 of the joint bundle of productions between parties and the Tribunal dated 12 to 28 February 2019 show that the claimant was seeking assistance from Strathclyde University Law Clinic at that point. At document 4 of the bundle (pages 45 to 48) there is an email dated 25 March 2019 where the claimant indicated that she had attended the Law Clinic again to advise they could not represent her. Therefore the claimant had received advice as early as March 2019.

20 On 1 April 2019 the claimant advised she had sought advice from Strathclyde University Law Clinic and that she may wish to amend her claim to include disability discrimination. In the Preliminary Hearing Note issued by Judge Doherty dated 1 April 2019, it was noted that the claimant if so minded should do this as early as possible. In the claimant's further particulars at document 6, (pages 57- 58 of the productions) the claimant states that she wished to amend her claim but then didn't. On 1 May 2019 the Tribunal asked the claimant to provide a written response in respect of whether she was intending to make an application to amend her claim which she did not respond to (document 7). On 5 May 2019 the claimant indicated that she may amend her claim but then didn't (document 8). At the Preliminary Hearing on 5 August 2019 the claimant indicated that she wished to proceed with an amendment application and she was subsequently ordered to do that within 28 days (document 9).

21 The respondent refers to the case of *Chandhok v Tirkey [2015] ICR 527* in that the claim set out in the ET1 requires to detail the eventual case that is being made. The overriding objective under Regulation 2 of the Employment Tribunal Regulations 2013 also applies to this application to deal with cases fairly and justly. The authority of *Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650* established the principles that are now welt known in the authority of *Selkent Bus Co Ltd v Moore [1996] ICR 836 EA.* The authority *of Kuznetsov v Royal Bank of Scotland [201 7] EWCA Civ 43* emphasises the importance of taking account of all the circumstances. The test is multi-factorial in that all circumstances should be taken into account and a balancing act undertaker] in order to weigh the nature of the amendment, the time limit and the timely manner of the application.

22 In terms of the nature of the amendment, it is unclear what legislative provision the claimant relies upon. The claimant has stated the nature of her impairment but further clarity would be required. The claimant's written application to amend her claim of 3 September 2019 sets out facts that are beyond the unfair dismissal claim as detailed in her ET1 . So this is more than a re-labelling of her existing claim and would have been within her knowledge at the time. Such an amendment may require witnesses and different evidence would elongate the evidence and also the Hearing. Given the passage of time, it is difficult to expect witnesses to have memories of the event the claimant is complaining of. This case can be distinguished from the authority *of Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07* in that it is a wholly new claim with a different jurisdiction, different tests and the respondent would not have expected a claim simply because the claimant was potentially disabled. As in the authority of *Reuters Ltd v Cole UKEAT/0258/17,* a consideration of a comparator would also be necessary. Further specification would be required if the amendment was allowed.

23 In respect of the time limits the amendment application is a new complaint. The claimant's employment ended on 18 December 2014 so the time limit to lodge her claim was March 2015, but the application to amend is made 4

years after that so it is well out of time. The situation that arose in the authority *of Bryant v Housing Corporation [1998] ESCA Civ 866* equally applies to the current case in that the claimant is required to show that her dismissal came about as a result of her disability discrimination which has not been pled and it would therefore not be just and equitable to allow the amendment.

24 In respect of the timing and the manner of the claimant's application, there will be prejudice to the respondent due to the time line. The claimant was aware of her ability to amend her claim as early as March 2019 and so she has delayed too long in doing so. The application doesn't fully state why the delay has occurred. The claimant was a solicitor with the respondent and therefore should have been familiar with methods of researching and time limits. Her lack of representation did not prevent her from claiming unfair dismissal so she could have raised disability discrimination at the same time. The claimant has also instituted legal action in the Court of Session and is represented. She had delayed too long and her application should be refused.

25 In terms of the hardship caused to either party in refusing or allowing this amendment the claimant would not suffer hardship as she is still entitled to pursue her unfair dismissal claim. She also has her Court of Session action. The respondent however would suffer hardship as it would have to investigate the new claims, call additional witnesses and there would be further cost to the respondent which would come from the public purse. The respondent has already suffered significant delay due to the way in which this case has been conducted by the claimant.

26 The respondent paid for the medical report from Dr Tilak in order to establish the claimant's ability to participate in this Tribunal process. This report states that the claimant is not cognitively impaired and her cognitive ability is good. She is able to articulate her views which suggests she has good information processing ability. There is no reason why the claimant was unable to express her disability discrimination claim cognitively at the time of the original ET 1 claim being lodged. It would be prejudicial to the respondent to allow this application as there will be more costs and delay as further specification would

be necessary and in accordance with the overriding objective, it is already a protracted claim. The balance therefore tips in favour of the respondent in respect of the hardship and justice test.

27 In her response to these submissions, the claimant stated that in July 2013 the respondent knew she had a disability when the doctor stated that her impairment was likely to last more than 12 months. The respondent has been arrogant and dismissive in the way she has been treated.

28 The respondent replied that even if the respondent had had knowledge of her disability at the relevant time they could not have anticipated a disability discrimination claim from the facts relied upon in the ET1 claim form.

Relevant Law

29 The authority of *Selkent Bus Co Ltd* v *Moore [1996] ICR836 EAT* states that a Tribunal must carry out a careful balancing exercise of all the relevant factors having regard to the interests of justice and to the relative hardship that will be caused to parties by granting or refusing the amendment. The factors to consider are the nature of the amendment, the applicability of time limits and the timing and manner of the application.

Conclusions

30 Having assessed the submissions and representations made by both parties, I am of the view that this application should be refused because the respondent will suffer a greater injustice and hardship in the amendment being allowed than the claimant will by it being refused. It is therefore in the interests of justice to dismiss this application and in accordance with the Overriding Objective under Regulation 2 of the Employment Tribunal Regulations 2013 to deal with cases fairly and justly. In reaching this view I have carried out the balancing exercise in accordance with *Selkent Bus Co Ltd ("supra")* and have taken account of the following factors in doing so.

I consider that the amendment is a new cause of action and not merely a re-labelling of the claim. This is because although the claimant submits that her

claim is for unfair dismissal while she had a mental illness, disability discrimination is a separate jurisdiction from unfair dismissal with its own applicable tests and different facts would require to be relied upon. She has also not provided any specification of her disability discrimination claim. Whilst I have had regard to the appellant's ill-health and her inability to instruct a legal representative to assist her with these proceedings, I am of the view that she had knowledge of all the material facts to plead a claim for disability discrimination at the time of her dismissal on 18 December 2014 and when presenting her unfair dismissal claim on 23 March 2015 and that her illness and lack of representation did not prevent her from lodging that claim.

31 As the amendment is a new cause of action there is a time bar issue in that the claimant's employment was terminated in December 2014 and the amendment application was not made until 3 September 2019. However, as I am refusing this application, the time bar issue will not require to be determined.

32 Notwithstanding that, the passage of time between the ET1 claim form being lodged on 23 March 2015 and the amendment application being made on 3 September 2019 is more than four years after the time limit for such an application and is a factor that weighs considerably against the claimant. Furthermore, it is not in dispute that the claimant sought advice from Strathclyde University Law Clinic in March 2019 and also intimated her wish to make an application for amendment at the Preliminary Hearing on 1 April 2019, at which it was recorded by Judge Docherty in the Note of Hearing that an amendment application should be submitted without delay. Additionally, in correspondence dated 1 May 2019, Judge Meiklejohn requested that the claimant confirm by no later than 15 May 2019 whether she intended to amend her claim to include disability discrimination which the claimant did not do.

33 Furthermore, as a new cause of action, to allow the amendment would clearly protract these proceedings as it still requires further specification from the

claimant and there may be a need for additional witnesses that would elongate the evidence and the Final Hearing which would incur further costs. Yet in refusing this application, the claimant is still entitled to pursue her unfair dismissal claim.

34 In all of these circumstances the application to amend is refused.

Employment Judge: R Sorrell
Date of Judgment: 18 November 2019
Entered in register: 19 November 2019
and copied to parties