



5

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102322/2018**

to

**Preliminary Hearing Held in Chambers at Glasgow Tribunals Centre on 8  
October 2021**

**Employment Judge O'Donnell**

15

**Mr J Wright**

**Claimant  
In Person**

20

**Citysprint (UK) Ltd**

**Respondent  
Represented by:  
Mr Whincup  
Solicitor**

25

30

35

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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

40

## REASONS

### Introduction

- 5 1. This hearing in chambers has been listed to determine the Claimant's application to amend his claim. The Respondent opposes this application.

### Procedural history

- 10 2. The Tribunal considers that it would be of assistance to set out a short summary of the procedural history of the case given that it is relevant to the factors which the Tribunal requires to consider in determining whether to exercise its discretion to allow the amendment.

- 15 3. The ET1 in this case was lodged in 2018 and brought claims of disability discrimination and holiday pay. The disability discrimination claims is pled on the basis that the Claimant's working relationship with the Respondent was terminated because he had taken time off for a cataract operation (and recovery). This occurred in September 2017 and, other than in relation to these proceedings, the Claimant has had no involvement with the Respondent since that time. The relevant medical condition which is said to amount to a  
20 "disability" in terms of s6 of the Equality Act 2010 (EqA) is the Claimant's cataracts. It is not conceded by the Respondent that this condition meets the definition of "disability" in s6 EqA.

- 25 4. At the time the ET1 was lodged and at the first case management hearing, the Claimant was represented by a firm of solicitors who had drafted the ET 1. The solicitors subsequently ceased to act for the Claimant in mid-2018 and since that time the Claimant has represented himself or, for a short period, was represented by his (now) ex-wife.

- 30 5. The case management process was paused for a period of time for two reasons. First, there was a period when the Claimant was unfit to deal with the case and, second, the impact of the Covid pandemic which affected all Tribunal proceedings.

6. A case management hearing was held on 15 October 2020 which primarily addressed the issue of disability status. At that hearing, it was noted by the Tribunal that the Claimant relied on various symptoms of his eye condition. It was also noted that the Claimant had other medical conditions (for example, PTSD and a brain tumour) but did not rely on those other conditions in relation to his discrimination claim. Directions were made for the preparation of a joint expert report in relation to the Claimant's cataracts.
7. A further case management hearing was held on 8 April 2021 to review progress in the case. At that hearing (amongst other matters), it was indicated that progress had not been made in relation to the instruction of an expert because the Claimant had indicated that he sought to rely on medical conditions other than his cataracts as amounting to a disability. It was the Claimant's position that he had instructed his solicitor about these other conditions but they had not been mentioned in the ET1.
8. At that hearing, the Tribunal explained to the Claimant that it was the medical condition relevant to the alleged act of discrimination that was relevant and which had to be a "disability" as defined in s6 EqA; the fact that other medical conditions could meet the definition would not assist him. The Claimant indicated that he wished to pursue claims based on other acts of discrimination to which his other medical conditions were relevant. The Tribunal indicated to the Claimant that any claim which was not pled in his ET1 would require an application to amend to be made.
9. A preliminary hearing was held on 28 and 29 July 2021 to determine strike-out applications made by the Claimant. At the end of that hearing, there was a review of the case management of the case and it was noted that no application to amend had been made by the Claimant. The Claimant repeated his intention to pursue claims beyond those pled in the ET1 and the Tribunal considered that this issue needed to be resolved to allow for progress to be made and for there to be clarity and finality as to the claims being pursued. It, therefore, made an Order for the Claimant to make any application to amend within 28 days of the July hearing.

10. The Claimant made an application to amend his ET1 by email dated 26 August 2021 and the Respondent set out its opposition by email dated 2 September 2021. The Tribunal determined that the application should be dealt with on the papers and listed the present hearing. It directed that any further  
5 submissions from either party in relation to the application should be lodged by 4 October 2021; the Respondent indicated that they were content to rely on what was said in the email of 2 September; the Claimant did not lodge any further submissions.

10 **The amendment**

11. The Tribunal does not intend to set out the amendment *verbatim*. It runs to 17 pages and includes matters which are already pled or are addressed to some of the existing issues in the case such as the Claimant's employment  
15 status

12. Rather, the Tribunal summarises the amendment as follows:-

- a. It repeats the existing claims relating to the termination of the working relationship between the Claimant and Respondent.
- b. It seeks to raise a claim that the Respondent applied a PCP (this is  
20 assumed to be a reference to the term "provision, criterion or practice" which is used in the EqA) to the Claimant because he wishes to claim he had worker status. He goes on to state that he was entitled to 5.6 weeks holiday as a worker which he had not been paid and which he sought to use to cover his period of time off due to his "*protected disability status*". It is asserted that this amounts to direct  
25 discrimination under the EqA because an illegal PCP was applied to him.
- c. It is also asserted that this amounts to indirect discrimination.

d. There is an assertion that the Respondent failed to make reasonable adjustments but no details of this are given. The ET1 already pleads a claim of a breach of the duty to make reasonable adjustments.

5 e. The amendment seeks to add a claim direct discrimination and harassment in relation to allegations that one of the Respondent's managers insisted that the Claimant's van be adapted so as to allow the Claimant to deliver dry ice. The Claimant links this to his condition of chronic asthma which he says could be adversely affected by being exposed to carbon dioxide from the dry ice. The amendment sets out the facts of the alleged harassment with the last incident said to have occurred on 7 September 2017 (that is, the same day as the working relationship ended).

10 f. It also alleges that the Claimant engaged in activities that were alleged to amount to "whistle-blowing". The Claimant alleges that he was directly discriminated against as a result of these activities and sets out the facts of this.

15 g. Under the heading of "whistle-blowing", there is an allegation that the Claimant suffered a broken finger during the course of his work.

20 h. The amendment goes on to allege that the Claimant was required to work more than 48 hours a week, was not allowed the minimum daily break and was not allowed rest breaks. All of this is said to be contrary to the Working Time Regulations. No details are given of these matters and, in particular, no dates are given as to when any alleged breach of the Regulations occurred.

25 i. There is an allegation that the Claimant was not paid the National Minimum Wage in relation to various matters such as when he was on call or when he was waiting for his van to be loaded.

30 j. The amendment concludes by listing the Claimant's medical conditions. This list includes the Claimant's cataracts and other conditions related to those such as dry eye and photophobia. It also

lists anxiety, depression, PTSD and brain tumour but does not connect any of these latter conditions to any of the alleged acts of discrimination.

- 5 13. The email of 26 August 2021 which presented the amendment asserts that it is being made because of the alleged negligence of his former solicitors in lodging the ET1. This is taken to be an allegation that the solicitors failed to plead the matters set out above that form the basis of the amendment. Nothing further is said in support of the application. The Claimant did include  
10 an attachment regarding carbon dioxide poisoning and made reference to this in the context of the harassment claim.

#### **The Respondent's objection**

14. As with the amendment, the Tribunal does not intend to set out the objections made by the Respondent but summarises their position as follows:-
- 15 a. It is submitted that some of the requested amendments do not set out a clear legal and factual basis.
- b. There were no grounds advanced as to why the amendment was not made earlier. It was noted that the Claimant had conduct of his own claim from around mid-2018 and that he had asserted that he had  
20 terminated his instructions because of the alleged failure to properly plead his case. He must, therefore, have been aware of the alleged omissions in the ET1 at the same time.
- c. Further, the Respondent finds it hard to believe that the Claimant had no seen his ET1 in draft form before withdrawing his instructions.
- 25 d. All of the matters in the application were in the Claimant's knowledge at the time the ET1 was lodged and since that time.
- e. No evidence has been provided to substantiate the allegation that he had instructed his solicitors in relation to these matters and they had failed to follow his instructions when drafting the ET1.

f. In relation to the claim relating to worker status, it is submitted that this is not a protected characteristic covered by the EqA.

g. Reasonable adjustments is already pled in the ET1.

5 h. The matters which appear under the heading of "harassment" are all said to be out of time having occurred, at the latest, in 2017.

i. The same is said of any claim which appears under the heading of "whistle-blowing". It is submitted that these are entirely new claims.

10 j. To the extent that the Claimant seeks to bring a personal injury claim relating to the allegation that he broke his finger at work, this is not a claim which can be heard by the Tribunal.

k. The claims relating to Working Time Regulations are wholly new claims lodged out of time. The same is said of the claims relating to the National Minimum Wage.

15 l. In relation to the list of disabilities, it is noted that the Claimant has not identified how these conditions (other than his cataracts and the symptoms of this, that is, double vision and photophobia) are in any way connected to the alleged acts of discrimination.

#### Relevant Law

20 15. 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.

25 16. 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.

17. 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

18. 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.

19. The first specific *Selkent* factor is the nature of the amendment itself. The Tribunal identifies three elements to the amendment; matters which are already pled in the ET1; new claims being raised; information which does not relate to an existing or new claims, specifically the list of the Claimant's medical conditions.

20. In relation to the matters which are already pled in the ET1, the Tribunal considers that the existing claims are adequately pled and what is said in the amendment adds nothing new. Indeed, in relation to the claim alleging a breach of the duty to make reasonable adjustments, the amendment says significantly less as it simply makes an assertion that adjustments were made with no specification of how the duty was engaged, the disadvantage to the Claimant and what adjustments should have been made to avoid this. The ET1, on the other hand, clearly addresses these issues.

21. As regards the new claims being raised, the Tribunal notes that these are entirely new matters which are not foreshadowed in the ET1 at all. It is not the case that these are new causes of action arising from facts which are already pled but, rather, entirely novel claims of which the Respondent has had no notice at all in the proceedings until the amendment was lodged.



22. Finally, there is narrating of the Claimant's medical conditions which are not then linked to any of the claims which are being pursued. Whilst this could be described as background information, the Tribunal does have the concern, as expressed at the case management hearing held in April 2021, that the Claimant is falling into the "trap" of thinking that he simply needs to identify a medical condition (or conditions) which meet the definition of "disability" of s6 EqA to be able to proceed with his discrimination claim even though any such condition is not the cause of the alleged discrimination. There is, otherwise, no reason why the Claimant would be listing these conditions given that they have no bearing on the claims, either original or new.
23. The second Selkent factor is the issue of the applicability of time limits. This arises in relation to the second element of the amendment which involves the new claims being raised by way of the amendment.
24. It is quite clear, on the face of it, that all of these new claims are out of time. Although the Claimant does not give specific dates for many of these new claims, given that the working relationship between him and the Respondent ended on 7 September 2017 then this is the last date on which any alleged unlawful act could have occurred. Further, it is quite clear from what is narrated in the amendment itself that these involved matters which occurred before the Claimant took time off for his cataract surgery and that the claims relate to matters which took place even earlier than September 2017.
25. In these circumstances, these new claims relate to acts which occurred over four or more years ago. The normal three month time limit which would apply to these claims, therefore, expired long ago and the claims are significantly out of time.
26. The Tribunal does have to take account of whether, if these claims had been presented by way of a fresh ET1, it would exercise the discretion given to it by the relevant statutory provisions to hear these claims out of time.
27. The discrimination claims would be subject to what is often described as the "just and equitable" test whereas the other claims are dealt with by the

“reasonably practicable” test. No matter which test applies, the first question for the Tribunal is whether there is an adequate explanation for the delay in raising these new claims.

5 28. The Claimant asserts that the new claims were all matters about which he had instructed his solicitors but that they had negligently failed to plead these in the ET1 as originally lodged. However, he has produced no evidence in support of this assertion.

10 29. The Tribunal is aware that the Claimant is in possession of his file from his former solicitors as the Claimant had relied on documents from that file in support of his application to strike-out the ET3 which was heard in July 2021. He was, therefore, in a position to produce any documents which show what instructions he gave to his solicitor and how the ET1 came to be lodged in the terms which it was, specifically that it was allegedly lodged without his instructions or approval. He has not done so.

15 30. In such circumstances, the Tribunal has no evidential basis from which it can determine why the ET1 was pled in the way it was. A failing on the part of the Claimant’s former solicitors is not the only explanation for the claims which the Claimant now seeks to add from being absent. There are a range of possibilities from the Claimant not instructing the solicitor about those claims through to the solicitor advising the Claimant that certain claims lacked merit and the Claimant accepting that advice. The Tribunal simply does not know and certainly cannot make any finding that the absence of these claims arise from a failing by the former solicitor.

20

25 31. The Tribunal considers that it is entitled, therefore, to proceed on the assumption that the Claimant’s former solicitors acted in the way which it would be expected that a reasonably competent and professional solicitor would act in the absence of evidence to the contrary. Specifically, that the ET1 was drafted on the basis of the instructions given to the solicitor about which claims were to be pled and that the ET1 was approved by the Claimant before it was lodged.

30

32. In any event, even if there had been a failure by the Claimant's former solicitor to properly lodge the ET1, this only explains why the claims now being added were not lodged at the time but provides no explanation why the claims are being raised more than three years after proceedings commenced.

5 33. The Tribunal does bear in mind that there was a period when the Claimant was unfit to deal with the case but that was only for a period of time and not the whole length of proceedings.

34. The Claimant has been representing himself for some time and it cannot be reasonably said that the absence of the new claims only came to light recently. It would have been obvious on the first reading of the ET1 that these claims were not pled. There has been no explanation from the Claimant as to why it has taken so long for this amendment to be made when the need for it would have been obvious from a very early stage.

15 35. In these circumstances, the Tribunal considers that it would not have exercised its discretion to hear these claims out of time, under either test, because there was no adequate explanation for the delay in these being raised and would have found that there was no jurisdiction for the claims to be heard if that had been the issue before it. However, time limits are only one factor to be considered in relation to amendments and are not determinative. The Tribunal will address the weight it gives to this matter below when dealing with the balance of prejudice.

25 36. The third Selkent factor is the timing and manner of the application. As noted above, this application has come three years after proceedings commenced in circumstances where the absence of the new claims from the ET1 as pled would have been obvious from the outset without any explanation for the delay.

37. Further, the application was only made after the Tribunal made directions for any amendment to be made within a certain time. It is not, in normal circumstances, for the Tribunal to tell parties to amend their claim and it would

normally be expected that, if a party identified a need for amendment, they would make an application.

38. In this case, however, the Tribunal was concerned to ensure that the question of what claims were being advanced was clarified so that progress could be made. It had already indicated to the Claimant at the April 2021 hearing that he would need to amend his claim if sought to advance a case other than that pled in the ET1 but no application to amend followed. At the July 2021 hearing, the Tribunal considered that this issue could not be allowed to hang over the proceedings and so made its direction in order ensure clarity and finality as to what claims were being advanced.
39. The Tribunal does take account of the fact that no substantive hearings have been listed in this case.
40. Having addressed the specific factors identified in Selkent, the Tribunal considered whether there were any other relevant factors.
41. The Tribunal was not being asked to assess the prospects of success at this hearing and did not consider that the merits of the case was a factor which should feature heavily in its consideration. However, the Tribunal does consider that a relevant factor is the degree to which any new claim being advanced is one which is either stateable or properly pled. It would tip the balance of injustice and hardship in the Respondent's favour if allowing the amendment would mean they faced claims for which the Tribunal had no jurisdiction or to which they could not sensibly respond.
42. In the amendment, there is one matter which is not competent claim before the Tribunal and that is the allegation regarding personal injury (that is, the Claimant's broken finger). The Tribunal does not have the power to hear such a claim and it cannot be in the interests of justice to allow an amendment to add a claim which would almost certainly be subsequently struck-out for want of jurisdiction.
43. Similarly, the claim relating to the application of a PCP because of the Claimant's worker status is not one which the Tribunal has the apparent power

to hear. The Tribunal found this claim very difficult to follow and it was not clear as to the statutory provisions on which this claim was founded. The terminology used by the Claimant (that is, "PCP", "direct discrimination", "indirect discrimination" and so on) suggests a claim under EqA but worker status, as the Respondent's agent correctly points out, is not a protected characteristic under that Act. To the extent that the Claimant seeks to link this to any disability, it is difficult to follow the logic of how he has been treated less favourably because of any disability.

44. At best, if this claim was added by way of amendment, there would require to be significant specification of the basis of the claim. The same would apply to other new claims, such as those relating to working time and the minimum wage, where the claims as set out in the amendment consist of broad allegations of wrongdoing with no detail as to when unlawful acts occurred or the factual basis of any wrongdoing.

45. The need for specification would involve parties in more case management which would not only involve time and cost for both sides but inevitably delay progress on substantive issues and the resolution of the case.

46. Turning to the balance of injustice and hardship between the parties, the Tribunal notes that, if the amendment is refused, the Claimant is not prevented from pursuing the claims that are pled in the ET1. This is not a case, therefore, where the refusal of the amendment would deny the Claimant access to justice as a whole but, rather, would simply mean he could not pursue the new claims raised in the amendment.

47. The Tribunal does consider that there is a significant prejudice to the Respondent if it allowed the amendment and added the new claims to the ET1. Not only would the Respondent face claims which it did not previously but it would face them in circumstances where the factual matters giving rise to these claims occurred some considerable time ago.

48. In these circumstances, the issues of time bar and delay by the Claimant are significant factors in the Tribunal's assessment of whether to exercise its

discretion. The considerable passage of time will inevitably prejudice the Respondent's ability to defend the claim as the memories of witnesses will have faded.

49. This is not a case where the Respondent could have been said to have been  
5 on notice of the new claims and taken steps to precognose witnesses at an earlier stage to preserve some record of their recollection.

50. The Tribunal does bear in mind that the Respondent has not indicated that it  
has not retained documents relevant to the new claims and so it does not  
place great weight on the question of whether such documents are available  
10 or not. All that can be said is that, given the complete lack of any foreshadowing of these additional claims, it cannot be said that the Respondent was on notice to retain documents other than those relevant to the claims pled by the ET1.

51. There is also the lack of specification of certain of these claims as set out  
15 above. The passage of time may impact on the Claimant's ability to provide a sufficient level of detail to give fair notice of these claims and this would lead to delay and additional work for all parties.

52. For these reasons, the Tribunal finds that the balance of prejudice, insofar as  
it relates to the new claims which the Claimant seeks to raise, falls in favour  
20 of the Respondent.

53. The Tribunal has given consideration as to whether the other elements of the  
amendment which do not directly raise a new cause of action should be  
allowed. For the following reasons, the Tribunal does not consider that they  
should.

25 54. First, although the Tribunal has identified different elements to the application, these elements are not easily separated. The amendment is not framed as discrete matters but rather something to be read as a whole.

55. Second, in relation to those matters which relate to the existing claims, the  
Tribunal, as set out above, considers that the amendment frames these in

less detail than the ET1. It would certainly be a retrograde step to replace the pleadings in the ET1 with the wording of the amendment; the ET1 (with some subsequent specification) adequately pleads the claims and no issue of fair notice arises from these; if the amendment were substituted then the specification of the claims would be back at square one.

56. Further, the Tribunal considers that the wording of the amendment does not add anything to what is pled in the ET1 and so allowing the amendment to the extent of adding the relevant wording (even assuming it could be separated from the amendment as a whole) provides no real assistance to the parties in clarifying the Claimant's case or identifying the issues to be determined by the Tribunal.

57. Third, in relation to the information which has no direct connection to the claims, that is, the list of the Claimant's medical condition, the Tribunal is concerned that, although this could be said to be background information giving rise to no new claim, adding this information could lead to confusion as to the issues in the case.

58. In particular, the Tribunal bears in mind that the need for an application to amend was triggered by the discussion at the April 2021 hearing regarding which medical condition required to be assessed in relation to disability status. Progress on a joint expert report had been stalled because the Claimant sought to have conditions other than those relating to his cataracts assessed by any expert. The Tribunal is concerned that adding the list of conditions to the ET1 would not provide the clarity and finality on this issue which had been intended so that progress on this issue could be made. The other medical conditions would then form part of the pleadings and may lead the case further into the "trap" of assessing whether medical conditions that are not connected to the alleged discrimination amount to disabilities. This cannot be in the interests of either party.

59. In these circumstances, taking account of all the matters set out above, the Tribunal refuses the application to amend the ET1.

5 Employment Judge: Peter O'Donnell  
Date of Judgment: 12 October 2021  
Entered in register: 13 October 2021  
and copied to parties

10

15