EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108776/2021

Preliminary Hearing held by telephone on 30 September 2021

Employment Judge A Kemp

Mr N Glenn — **Claimant**
Represented by
Ms A Smillie

HOKO Design Ltd — **Respondent**
Represented by:
Mr R Dempsey
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal grants the claimant's application to amend his claim (a) to add an incident alleged to have occurred on 5 April 2021 to the claim under section 26 of the Equality Act 2010 (b) to add a claim under section 100 of the Employment Rights Act 1996 and (c) to add a claim under section 15 of the Equality Act 2010.

REASONS

Introduction

1. This was a Preliminary Hearing held to consider issues of case management, dealt with by separate Note, and an application made by the claimant, in effect, to amend his claim by provision of Further and Better Particulars. There has been an earlier Preliminary Hearing in this case.

2. The issue of amendment being raised at this hearing had been referred to in the email arranging it sent to the parties. The parties agreed before me that it was appropriate to determine this hearing and I was satisfied that it was within the overriding objective to do so.

3. The respondent confirmed that save as was objected to below the Particulars were accepted as providing additional detail of claims already pled.

Submissions

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

5. Mr Dempsey argued that three aspects of the Further and Better Particulars amounted to amendment, and should be refused. The first was an incident on 5 April 2021 which was after the Claim Form had been submitted. The second was a claim under section 100 of the Employment Rights Act 1996 and the third a claim under section 15 of the Equality Act 2010 (although he addressed those second and third matters in his oral submission in the opposite order).

6. With regard to the first matter he argued that it was out of time, and that the respondent would be prejudiced by the addition of time and cost to matters to be addressed. It would add to complexity and detail. With regard to the second he argued that it was not a matter raised in the Claim Form, that the claimant was moving the goalposts, and that it was a mistake to add new claims as if they added to the remedy or prospects. With regard to the third claim he argued that this should not be permitted, but when the authority of Dorrington referred to below was raised by him

candidly accepted that his argument on that was not as strong as the other matters.

7. Ms Smillie argued that the amendments should be allowed. She was not legally qualified, nor was the claimant. The claimant had prepared the Claim Form and she had read it. They had mentioned discrimination in the Claim Form and did not know that they should have added specific provisions. The Further and Better Particulars had been provided on 6 July 2021 and the incident on 5 April 2021 referred to in the agenda provided earlier. Adding the new claims was she argued a matter of justice.

The law

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

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

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

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

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

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

> "Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
>
> What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant;
>
> *"(a) The nature of the amendment*
>
> Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the

additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, eg, in the case of unfair dismissal, s.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

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

13. The first two categories are noted as being those where amendment may more readily be allowed (although that depends on all the circumstances and there may be occasions where to allow amendment would not be appropriate). The third category was noted to be more difficult for the applicant to succeed with, as the amendment seeks to introduce a new claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time.

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

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

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

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

16. The assessment of what is just and equitable involves a broad enquiry with particular emphasis on the relative hardships that would be suffered by the parties according to whether the amendment is allowed or refused.

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

18. No single factor, such as the reason for delay, is determinative and a Tribunal should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278.*** In ***Vaughan v Modality Partnership [2021] IRLR 97*** the EAT summarised matters and held that there was a balance of justice to be struck between the parties in which the issues of hardship and prejudice were key.

Discussion

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

5 April 2021

(a) Nature of the amendment

This could not have been raised in the Claim Form as it post-dated it. The matter raised is said to be a reaction to the Claim Form, which raises allegations of harassment under section 26. It is I consider in the first category of case referred to in ***Harvey.*** Whilst this may lengthen the case to an extent, and cause a measure of expense, it does appear to me to be related to the events pled at least potentially, and it is not a new case of action but an additional fact for an existing cause of action.

(b) Time-limits

The Further and Better Particulars were provided two days outside three months from the event, but that is mitigated firstly by the

reference to the matter in the agenda considerable earlier, and secondly my view that it is, if late, just and equitable to allow it to proceed. An agenda return provides specification of issues, and has a function similar to that of pleading - see ***Ministry of Defence v Dixon UKEAT/0050/17.*** It is hard to see that there can be any evidential prejudice from a delay of only two days, and none was directly suggested.

(c) Timing and manner

The particulars were provided, I was informed, 14 days after the first Preliminary Hearing, and that is not an undue delay. I also take account of the fact that neither the claimant nor Ms Smillie who is representing him are legally qualified.

(d) Conclusion

In all the circumstances it appears to me to be in accordance with the overriding objective to allow the existing claim for harassment to be amended by reference to the incident alleged to have occurred on 5 April 2021.

s.100

(a) Nature of amendment

I consider that there is at least some causative link with the original Claim Form. There was there a reference to Covid-19 compliance, health and safety issues, and what was described as a Christmas party. In addition the respondent accepted at the first Preliminary Hearing that the claimant had pursued in the Claim Form a claim of unfair dismissal under section 103A of the 1996 Act. There is authority to the effect that amending a claim from unfair dismissal under section 94 to include a claim under section 103A is not a new claim ***(Dorrington v Tower Hamlets UKEAT 0309/2019*** for example), and I consider that essentially by parity of reasoning a claim added to the existing claim under section 103A, to include one under section 100, is also not a new claim but another variant of an unfair dismissal claim, albeit one that is on an automatic basis and not under section 94, as the claimant does not have service for that. The statutory provision

and terms are different, but the foundation of the alleged protected disclosure was health and safety, and basis of the section 100 claim. I consider that it is in reality a new label for an existing claim. The case of ***Chandok v Tirkey [2015] IRLR 195*** which the respondent referred to when writing to oppose the amendment is one to take account of, but I also take into account that the claimant was acting for himself when framing the Claim Form, is now represented by someone not legally qualified, and did refer in the Claim Form to making a claim of unfair dismissal which includes one under section 100. It is true that section 100 was not directly referenced, but that is generally the case in such re-labelling cases. These matters all tended to favour granting the application.

(b) Time limits

As a new label I do not consider that this issue directly arises. I consider that this is a neutral matter in the analysis of whether to allow amendment.

(c) Timing and manner

The application followed the Preliminary Hearing, which in turn followed matters being raised in the agenda return provided by the claimant. He did not I consider unduly delay in raising the issue, although he may have addressed these matters more fully in the Claim Form. The respondent did not point to a material level prejudice. Those factors tend overall to support his application.

(d) Conclusion

It appeared to me that the balance of prejudice favoured the granting of the application to amend. The prejudice to the respondent is limited in the context of what is generally re-labelling. In all the circumstances I considered it appropriate to refuse the application to amend.

s.15

(a) Nature of amendment

The basis of the allegation is what are said to be arrangements for a Christmas party, which is a matter referred to in the Claim Form. There

is a measure of a causative link in my judgment, in that there is at least something said in the Claim Form on which the present argument proceeds, but this is a different claim to that under section 26, albeit that it is a matter that may be relevant to a claim under section 26. They are not entirely new facts, and there is not a wholly different enquiry into them from those set out in the Claim Form. But the context and detail is different. The statutory tests for the two provisions in sections 15 and 26 are also very different, which a potential defence under section 15 that does not exist under section 26, such that it is possible that one claim could succeed but the other fail, although it may be that both would fail or succeed. It is not easy to see on what basis the claimant's argument that the events of which he claims arose out of his disability as section 15 requires. He may consider that what happened was not appropriate, but it seems to me that there are limited prospects of success for him in the argument under section 15. The facts may be relevant for other claims, but not obviously one under section 15, quite apart from the defence in subsection (2). That having been said, the Supreme Court has indicated in ***Anyanwu v South Bank Students [1] Union [2001] IRLR 305*** that there is a public interest in having discrimination claims heard. Matters depend very largely on the evidence heard, and there are dangers in seeking to determine prospects of success for a claim prior to hearing the evidence.

(b) Time-bar

This is I consider a new claim. There is, in all the circumstances, including the provision of detail in the agenda, in my judgment limited prejudice to the respondent if it proceeds, and it is just and equitable to allow the claim to proceed even if late under section 123 of the 201 0 Act. On that basis whilst outside the primary time-limit, it is not outwith the jurisdiction of the Tribunal.

(c) Timing and manner

The background to matters I have addressed above and equivalent considerations apply.

(d) Conclusion

This was a finely judged matter. Each side has arguments with some strength in them. Even if there are new facts pled as I consider is the case here, that is not determinative. I consider that the balance of hardship and prejudice favours granting the application. The prejudice to the respondent is limited as the general facts are potentially relevant to other claims such that the evidence will be heard, but it is there. There is a potential defence of objective justification under section 15 which would need pleading then specific evidence. That would add to the expense. Against that is the potential prejudice to the claimant. Whether adding this new claim makes any real difference for the claimant is at best not clear, but in my judgment it is not safe to say that it will not, at a stage before hearing evidence. The issues under section 15 are not the same as those where claims are accepted to be in time or otherwise permitted to proceed, and my assessment is that the claimant would have difficulty in establishing any case under this section such that the hardship and prejudice to him of it not being permitted to proceed with it is limited, but it too is there, and as I have set out making such an assessment prior to hearing evidence is far from straightforward. Whilst in addition I take account of the fact that the claimant has other potential remedies, the law is different for each provision and success on section 15 but not section 26 or sections 100 or 103A of the 1996 Act is possible. Assessing all of the issues I consider that the claimant is, just, liable to suffer the greater hardship and prejudice should I refuse his application. In all the circumstances I considered it appropriate to grant the application to amend in this regard.

Conclusion

20. The application to amend to add claims is therefore granted.

Employment Judge: Sandy Kemp
Date of Judgment: 30 September 2021
Entered in register: 04 October 2021
and copied to parties