EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107694/2021 Preliminary Hearing by Cloud Video Platform (CVP) on 3 September 2021
Employment Judge: M A Macleod

Markie Obukowho Dales	**Claimant** **Represented by** **Mr A McMillan** **Barrister**
Boots Management Services Ltd	**Respondent** **Represented by** **Mr A Graham** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's application to amend her claim dated 4 May 2021 is allowed.

REASONS

1 . A Preliminary Hearing was listed in this case to take place by Cloud Video Platform (CVP) in order to determine whether the claimant's application to amend her claim should be granted.

2. Mr McMillan, Barrister, appeared for the claimant, and Mr Graham, Solicitor, appeared for the respondent. The claimant did not attend, but the claimant's representative was able to speak on her behalf.

3. A joint bundle of productions was presented to the Tribunal and relied upon by the parties in the course of the hearing.

4. The hearing proceeded on the basis that both representatives made submissions to the Tribunal, referring to the documents as appropriate.

Submissions

5. For the claimant, Mr McMillan referred firstly to the application to amend the

claim (46ff). It was confirmed that the claimant sought leave to add a claim for breaches of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, amounting to both automatically unfair dismissal and unlawful detriment.

6. The claimant's primary position was that the claim under the 2000 Regulations ("the PTW claim") was intimated in the claimant's grounds of complaint at paragraphs 9 and 10, which stated:
9. *"The claimant will aver that TW did not assist her to advance her management position or support her in her role. They had one conversation when JH put in her notice in mid-July which was whether or not the claimant was willing to work for 4 days, as the previous manager had worked done this (sic). The claimant was prepared to do this, but it was not discussed further.*
*10. TW called the claimant at the end of the day on 9 September and said that she had not been successful, and that the candidate had more experience and would work 5 days a week. She told her that she would put her through as 'performing", didn't know what she would do with her and would return her to her old area (in effect a demotion). TW was going on leave for two weeks and so the conversation was brief and dismissive, there was no discussion of her options for the future. **

7. The claimant asserted that it was at the heart of her claim that TW (Ms Tracey Wilson, her area manager, advertised her job share role as a full time vacancy, despite it being a permanent job share position thitherto.

8. It was submitted that the new claims (which amounted to a new legal label, were based on material facts which had already been pled.

9. She sought then to add to her claim a new wording for the sub-heading "Pregnancy Discrimination", below paragraph 5 of the grounds of claim, to read "Pregnancy Discrimination and PTW claims".

10. She also invited the Tribunal to allow her to add wording to paragraph 17, so that it would now read that she was unfairly constructively dismissed on the grounds of her pregnancy *"and/or automatically unfairly constructively dismissed where the reason/principal reason was her C's refusal to waive her PTW rights under Reg 7(3)(a)(vi) and C further claims she suffered Reg 7(2) detriment in the ways set out at paras 6(a) and (b) of these Particulars of Claim".*

11. Mr McMillan submitted that the claim is essentially that the claimant had proposed working for 4 days per week, and that the successful candidate to be appointed would work 5 days a week. It should come as no surprise to the respondent that the claimant is talking about the less favourable treatment of the claimant under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

12.With regard to jurisdiction, the claim relates, he submitted, to the claimant's resignation on 10 February 2021. Without adding time for ACAS early conciliation, the limitation period ends on 9 May 2021 . The application to amend was submitted on behalf of the claimant by email on 4 May 2021 (44). Mr McMillan argued that whether or not the acts amounting to less favourable treatment are deemed to be one-off events or a series of continuing acts, time would run from the last of those acts.

13. In any event, the Tribunal has the discretion to extend time for presentation of an amendment application. The complaint relates to the claimant's resignation on 10 February 2021. The application was presented within 3 months of that date, as suggested by the Tribunal in the Preliminary Hearing Note dated 27 April 2021 by Employment Judge d'lnvemo when allowing, at Order (First), a period of 14 days to the claimant's representative (that is, by 3 May 2021) within which to intimate and lodge with the Tribunal a proposed amendment together with a correlative application for leave to amend made in accordance with the Rules of Procedure.

14. Mr McMillan observed that the claimant could have presented a new claim form with the new allegations, and sought to consolidate the two claims.

15. The detriments complained of were not some earlier act but the decision taken at the date of the grievance outcome and the decision to accept the claimant's resignation in response to that

16.Mr McMillan accepted that the amendment is "non-trivial", but that it is essentially a re-labelling exercise, in which no new facts are pled and no additions are proposed other than the labelling of the conduct.

17.lt is always prejudicial to lose a cause of action if there is a legally arguable claim. While it is not a good outcome for the respondent to have to face a new head of claim, there are no new facts alleged nor can the complaint come as a surprise to them. The prejudice to the claimant of losing the right to have such a claim heard at a public hearing outweighs any prejudice to the respondent, which would be dealt with by a costs application or judgment in the respondent's favour.

18.1 asked Mr McMillan to explain, if he could, why the PTW claims were not included within the original claim, and he was unable to do so.

19.For the respondent, Mr Graham referred to and relied upon the terms of two emails sent to the Tribunal in response to this application to amend, found at 57 and 64/5.

20. The email of 15 June 2021 (57) observed that the claimant had not copied the respondent in to the application to amend, and also that the application was presented out of time, beyond the deadline granted by the Tribunal of 3 May 2021 , without explanation.

21.As I understand it, Mr Graham did not insist upon either point before me.

22. He referred to the respondent's substantive submission set out in their letter of 6 August 2021 (64/5).

23. He set out the sequence of events, and then pointed out that by the claimant's own admission, the facts which the claimant was seeking to rely upon related to mid- July 2020 and 9 September 2020 respectively. The time limit for presentation of claims in relation to those facts expired in mid October 2020 and 8 December 2020 respectively. If ACAS Early Conciliation had been engaged timeously, the original claim form should have been presented by no later than 8 January 2021 , and as a result that claim was submitted nearly 6 weeks out of time.

24.He argued that it is accepted law that a PTW claim must be presented to the Tribunal before the end of the period of three months beginning with the date of the relevant act or omission, subject to the rules of early conciliation.

25. The respondent disputes that following its grievance policy was a continuing act, and submits that this has not, in any event, been pled by the claimant. The claim form makes no reference to part time working in paragraphs 1 1 and 12, which are those parts set out under "Grievance Process".

26.Mr Graham also submitted that the claimant has not set out any reason upon which it would be just and equitable to allow the late presentation of these claims. The claimant has been legally represented throughout these proceedings and had every opportunity before the Preliminary Hearing of 19 April 2021 to make an application to amend but did not do so.

27. In addition, there is no explanation before this Hearing, he said, as to why there has been such a delay, particularly given that the claimant was represented by a solicitor from the Pharmacists' Defence Association throughout the proceedings.

28. The respondent will be subject to prejudice if the claims sought are added in at such a late stage.

29. The respondent reiterated that they do not accept that this could amount to a continuing series of acts.

The Relevant Law

30. In determining that issue, It is appropriate to refer to the overriding objective of the Employment Tribunal, set out at Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:
"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."

31. There is a useful formulation of the types of amendment which are typically put forward by parties in Tribunal proceedings in *Harvey in Industrial Relations and Employment Law,* Division T at paragraph 31 1 .03:
"A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim; and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to

the original claim at all."

32. An important authority in this area is **Selkent Bus Co Ltd v Moore** 1996 ICR 836. At p.843, Mummery J, as he then was, said:
"(4) 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
(5) 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 addition 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, e.g. in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978.
(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 Regulations of 1993 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".

33. The Tribunal was also referred to Office of National Statistics v Ali [2004] EWCA Civ 1363. At paragraph 39, Lord Justice Waller states:
"In my view the question whether an originating application contains a claim has to be judged by reference to the whole document. That means that although box 1 may contain a very general description of the complaint and a bare reference to the particulars to an event..., particularisation may make it clear that a particular claim for example for indirect discrimination is not being pursued. That may at first sight seem to favour the less particularised

claim as in Dodd, but such a general claim cries out for particulars and those are particulars to which the employer is entitled so that he knows the claim he has to meet. An originating application which appears to contain full particulars would be deceptive if an employer cannot rely on what it states..."

34. In paragraph 40, he went on: *"One can conceive of circumstances in which, although no new claim is being brought, it would, in the circumstances, be contrary to the interests of justice to allow an amendment because the delay in asserting facts which have been known for many months makes it unjust to do so.. . There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time. . . "*
Discussion and Decision

35. The issue before the Tribunal may be set out succinctly as follows: whether the claimant's application to amend her claim to include a complaint under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 should be allowed.

36. It is acknowledged on the claimant's behalf that the application involves the proposed inclusion of a new claim which is "non-trivial". It is clear that the amendment seeks to add a new head of claim not previously pled, though reliant upon the same facts as already included within the claim.

37. As a consequence, this is a type (ii) amendment, as set out in Harvey (above), namely amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim.

38.As Mummery J put it in Selkent, the Tribunal requires to take into account all the circumstances, and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

39.It is suggested in that case that the Tribunal should consider a number of particular factors in this exercise, and I do so now.

40. Firstly, the Tribunal must consider the nature of the amendment. In this case, the amendment seeks to add a new head of claim based on the existing facts. There are no new facts added by the amendment. The new claim sought is that as well as having been constructively unfairly dismissed on the grounds of her pregnancy, the claimant was also or alternatively ("and/or") constructively unfairly dismissed where the reason or principal reason was her refusal to waive her part time workers' rights under Regulation 7(3)(a)(vi); and that she suffered detriment under Regulation 7(2) in the ways which had already been set out at paragraphs 6(a) and (b) of the original claim.

41. Secondly, the Tribunal must consider the applicability of time limits. I shall return to this point below, as it has some complexity to it.

42. Thirdly, the timing and manner of the application must be considered. The timing is a matter relevant to the applicability of time limits. The application was submitted to the Tribunal on 4 May 2021, following a Preliminary

Hearing before Employment Judge d'Inverno on 19 April 2021. It was set out, helpfully, by way of tracked changes to the original Particulars of Claim, and was done following the Order of the Tribunal in which the claimant was permitted 14 days from 19 April 2021 (that is, 3 May 2021) to intimate and lodge with the Tribunal the terms of a proposed amendment with a correlative application for leave to amend made in accordance with the Rules of Procedure.

43. The application was in fact made outwith that timescale, but on 4 May 2021 . Little turns on that point, in my view, though I noted that no explanation was given as to the lateness of the application. I disregard this as having any bearing on the decision which I have to make.

44. The application was therefore made within the period of 3 months from the date of the claimant's dismissal, and the claimant's position is that it was made within the statutory deadline. Since it could readily have been made as a new claim to the Tribunal, it is argued on the claimant's behalf that seeking to amend is a more efficient and less expensive process and should therefore be allowed.

45. The respondent's position, however, is that the time limits did not start to run from the date of the claimant's dismissal, but from the date upon which the allegedly unlawful act or acts took place. They observe that by the claimant's own admission the acts upon which she seeks to rely took place on mid-July 2020 and 9 September 2020 respectively. This is a reference to the averments set out in the original Particulars of Claim (53), at paragraph 9, in which the claimant avers: *"The Claimant will aver that TW did not assist her to advance her management position or support her in the role. They had one conversation when JH put in her notice in mid-July which was whether or not the Claimant was willing to work for 4 days, as the previous manager had worked done this (sic).";* and at paragraph 10 (54), where it is alleged that *"TW called the Claimant at the end of the day on 9 September and said that she had not been successful, and that the candidate had more experience and would work 5 days a week. She told her that she would put her through as 'performing 1, didn't know what she would do with her and would return her to her old area (in effect a demotion). TW was going on leave for two weeks and so the conversation was brief and dismissive, there was no discussion of her options for the future."*

46.The respondent submits that there was no continuing series of acts in these allegations, but two separate allegations which were not ongoing. The claimant submitted that whether they were a series of continuing acts or one off incidents the time limit would run from the date of the claimant's dismissal.

47.It is certainly the case that the claimant's claim of unfair constructive dismissal on the grounds of part time status should be considered to have been presented within three months of the date of termination of the claimant's employment, and as a result, must be within the statutory deadline. As a result, it is my judgment that this particular new claim cannot be considered to be out of time.

48. As to the claim that the claimant suffered from detriments as a result of part time working, it appears to me that the detriments are alleged to be the

actions of the respondent in mid-July and 9 September when they, in the claimant's view, treated her less favourably in the decisions which were made on those occasions due to her part time status.

49. The assessment of the applicability of time limits in this case is limited by the fact that the claimant did not give evidence at this hearing. I am not in possession of any evidence, nor indeed of any explanation, as to why the claim of detrimental treatment under the 2000 Regulations was not included in the claim when it was initially submitted. There may well have been an issue of time bar even if such a claim had been included, but since the claimant was legally represented at the time of presentation of the claim, one would expect to see some explanation as to why it was not part of the original claim.

50. Since I have no evidence on this point I am unable to make any positive finding of fact about it. All that can be said is that it was not included, and no explanation has been given.

51 . Further, I find it impossible to reach any conclusion about the applicability of time limits, and whether the detriments claim should be taken to be timebarred, in the absence of any evidence from the claimant about why it was not previously raised, either in the original claim form or indeed prior to that. The Tribunal may consider that a claim presented out of time may be allowed to proceed if presented within such time as the Tribunal considers just and equitable, but again, in the absence of evidence from the claimant as to why such discretion should be granted, no positive finding can be made about that.

52. 1 require, however, to consider all the circumstances of the case, and to weigh up the relative hardship and prejudice accruing to the parties dependent on the decision made.

53. It is plain that the claimant will consider that she suffers prejudice if her claim of constructive unfair dismissal and of detriments under the 2000 Regulations is refused, in that she will lose the right to pursue claims which are based on the facts already pled before the Tribunal. On the other hand, it is my view that the respondent will not suffer prejudice in requiring to deal with these matters, since the factual averments are already before them and would require to be addressed in witness evidence in the hearing on the merits of the case. It is the status of those averments - as founding specific allegations, rather than merely as background - which changes.

54. Taking all of these factors into consideration, I have concluded that the application to amend the claim to introduce the two new heads of claim should be granted, but subject to the issue of time bar being reserved to the hearing on the merits, so that evidence may be led and submissions made about the questions of whether the grievance process amounts to a continuing act with the two alleged detriments identified above, and whether, if the claim has been presented out of time, it is just and equitable for the Tribunal to exercise its discretion to allow it to proceed.

55.It is quite true that the claimant has been legally represented throughout these proceedings, and that no explanation has been properly put forward on her behalf by those representatives which could allow the Tribunal to reach any conclusion on time bar at this stage. The respondent is clearly of

the view that that amounts to a failure which should not benefit the claimant. However, I consider that it would be unfair and prejudicial to take a decision without having heard evidence and submissions on the point. I have no doubt that the respondent will be in a position to set out the history of this matter very fully in their argument that the matter should not be allowed to proceed, but in the end I have concluded that the constructive unfair dismissal claim under the 2000 Regulations is not out of time (running as it does from the date of termination of employment), and as a result the facts which have been averred will require to be the subject of proof at a hearing on the merits anyway.

56. 1 am influenced by the fact that no new facts are pled and that the terms of the original claim are such as to give rise to a complaint that the claimant's part time status was a factor in the decisions made by the respondent. As a result, it would be contrary to the interests of justice to prevent these new claims being included within those complaints taken to probation at a final hearing. The respondent is not faced with an extended hearing or a longer list of witnesses in defending the claim. Their submissions, well put as they were, essentially amounted to criticisms of the way in which the amended claims were not included within the original particulars of claim, and in my judgment, that does not amount to the imposition of hardship or prejudice upon them such as to outweigh the prejudice to the claimant of not allowing these new claims to proceed.

57. Accordingly, it is my judgment that the claimant's application to amend the claim is allowed.

58. Date listing letters should now be issued in order to identify suitable dates upon which to list a hearing on the merits.

Employment Judge: Murdo Macleod
Date of Judgment: 04 October 2021
Entered in register: 13 October 2021
and copied to parties