EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4109375/2019 (A)

Held by Telephone Conference Call on 15 June 2020

Employment Judge A Kemp

Mr T Connelly	**Claimant** **In person**
Brightwork Limited	**Respondent** **Represented by:** **Ms E Batten** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application to amend his claims to include claims under the Agency Workers Regulations 2010 both against the respondent and against a prospective second respondent is refused.

REASONS

Introduction

1. This hearing followed earlier Preliminary Hearings on 4 December 2019, 25 March 2020 and 22 April 2020. A Judgment was also issued on the last date dismissing all but one of the claims followig a finding that the claimant was not an employee. Those claims included dismissal in relation to health and safety issues, as to make that claim the claimant must be an

employee under section 100 of the Employment Rights Act 1996. The claimant has not sought to challenge that decision. Following that Judgment one claim remained, being that the claimant was subjected to a detriment for having made protected disclosures, since such claims can be brought by workers. The respondent has conceded that the claimant was its worker, although it disputes the claim made in all other respects.

2. The claimant had originally been ordered to set out the legal basis of the claims he made by the order of EJ McManus at the first Preliminary Hearing. It was at best not clear that he had done so with adequate detail. Thereafter the claimant indicated that he wished to make a claim under other provisions, which he referred to latterly in an email dated 8 May 2020 in which he sought the adjournment of the Preliminary Hearing fixed for 18 May 2020. EJ Whitcombe allowed that adjournment by email dated 15 May 2020 and directed that, if the claimant wished to bring any claim under the Agency Workers Regulations 2010 ("AWR"), or any other legislation not so far identified in his claim form or further specification, then full written details identifying the particular section or regulation allegedly breached must be supplied to the respondent and to the Tribunal within seven days. Any such communication was to be treated as an application to amend.

3. The claimant did not provide any such details in time. He did however send a written document with attachments which the respondent received on the day of the hearing before me, with Ms Batten receiving it herself about an hour before the hearing at 2pm, and which I had not been aware of when the hearing commenced. In fact during the course of the hearing an email was sent to me by the clerk stating that a document had been received. I did not see that email until after the hearing concluded. In the course of it however the claimant did state that it had been sent, and spoke to it, as did Ms Batten.

4. It was agreed that I would consider the terms of the amendment application once it was sent to me, together with the arguments made by each of the parties. I have done so. I have been sent the document from the claimant referred to. It has three parts. The first is a typewritten

document headed “Bullying in the Workplace – Report – T Connelly”. It sets out a number of allegations of incidents that are said to have caused physical or psychological injury. The second is handwritten, sets out various allegations and puts forward a number of statutory provisions, referred to as sections (which during the hearing before me were explained as references to what are in fact Regulations in the AWR). They are, in the order provided, all within Regulation 17 and have the following paragraph details – (3)(a)(iii); 5(1); (1); (2) (a) (i),(ii) and (v). The third contains photographs, one of which is of the noticeboard at the hirer with comments “we are looking to replace Tommy with [name] do you have any concerns”. The documents produced do not suggest any other statutory basis for a claim than the AWR, and none was raised at the hearing before me.

Discussion

5. The question of whether or not to allow an amendment is a matter for the exercise of discretion. There is no right on the part of either party to amend their pleadings. The nature of the exercise was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. All of the circumstances must be considered. There are three particular issues that require consideration.

6. Firstly the **nature of the amendment**. Here the claimant did not make explicit that he was pursuing a claim as an agency worker under the AWR in the Claim Form. The claim was pursued on the basis that the claimant was an employee, and included ones for automatic unfair dismissal under the health and safety provision referred to above. I have read the Claim Form again, and allowing for the fact that the claimant is a litigant in person I have not found anything that can properly be said to suggest a claim under the AWR. It is a matter I refer to further below.

7. The claimant further sought to explain the proposed amendment during the hearing. I have considered it further in light of what has been written, and was said at the hearing before me. I shall deal with each part in turn.

(i) The written document starts with reference to Regulation 17(3)(a)(iii). I do not consider that that can apply. It allows an agency worker to request a written statement, but that requires there to be a breach of Regulation 5, as provided for in Regulation 16(1). For the reasons given below, I think it most unlikely that the claimant can establish a breach of Regulation 5. On that basis, I do not consider that there is any reasonable prospect of this part of his claim succeeding.

(ii) The second is Regulation 17(5)(i). There is only paragraph (5) however, and that states that a detriment under paragraph (2) does not apply to a dismissal under Part 10 of the Employment Rights Act 1996. That is the Part (noted as X in the Act) that provides for the right of an employee not to be unfairly dismissed. As the claimant was held not to be an employee I cannot see how that provision is helpful to the claimant, or one that he can found upon. The claimant in his document suggests that he is entitled to the same basic working rights and conditions as an employee of the hirer, which is correct, and refers in turn to Regulation 6 which lists the relevant terms and conditions which are protected, and referred to below.

(iii) The third is Regulation 17(1). What the claimant has written however misses out important provisions. The key one is the words "who is an employee". As referred to, the claimant has been found not to be an employee, and the unfair dismissal provisions are not I consider ones he can found upon.

(iv) The fourth is Regulation 17(2), which provides that an agency worker has the right not to be subjected to any detriment done on a ground specified in paragraph (3). In order to be able to pursue a claim for breach of Regulation17(2) therefore, one of the grounds in paragraph 3 must be engaged. The claimant refers to sub-paragraphs (i) (ii) and (v). The first two cannot apply. There were no proceedings made under the AWR during the claimant's working for the respondent, and he could not have provided any evidence or information in relation to such a claim. The third, sub-paragraph (v) relates to an allegation of breach of the Regulations. I asked the

claimant at the hearing, after he explained this basis of the claim he sought to make under the AWR, what that alleged breach was. He said that it was the difference in treatment he received by being bullied, not invited to health and safety meetings or similar meetings, and what he said was a breach of a duty of care. He alleged that he had been required to carry out unsafe work, and told that if he did not do so his contract would be terminated. He referred to moving heavy casks, weighing 500 pounds, the risk of injury, and actual injury he said he suffered. In his document he refers to matters including driving a forklift truck which emitted diesel fumes. There is also the notice which is referred to above. He alleged that both the respondent and the hirer, who he sought to add as a second respondent, were in breach of the AWR from those facts. I consider that such an argument is very likely indeed to fail. The rights are set out in Regulation 5, and Regulation 6 has a list of the relevant terms and conditions which are engaged. They do not cover the allegations made by the claimant, but issues as to pay, working time, night work, rest periods and breaks, and annual leave. He has not alleged such breaches, in fact he accepted that he was paid at the appropriate level. There is no suggestion that he alleged a breach of the AWR either to the respondent or the hirer, who the claimant seeks to add as a second respondent, still less that any allegation was of what could be a breach under the Regulations.

8. In short it appears to me that the claimant is seeking to use the AWR to cover his own circumstances where at the very least a highly strained interpretation of the Regulations would be required. That is not entirely impossible. The AWR give effect to the Agency Workers Directive 2008/104/EC, and as such require to be given a purposive construction. The protection of that Directive however is addressed to the same list of issues as set out in the Regulations, covering broadly issues of working time and pay. The Directive does not cover what may be referred to as health and safety matters, which is what the claimant is seeking to raise. I consider that the claimant has little if any reasonable prospects of success in seeking to use a purposive construction to establish a breach of

Regulations 5 and 6. My conclusion in relation to these matters is that the claimant's proposed claim under the AWR has very little, if any, reasonable prospects of success.

9. There is some further guidance in authority which is I consider relevant to the matter. 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

> " … to 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."

10. It has also earlier been held that it can be 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 and sex discrimination claim to alleged victimisation, which was a claim she subsequently sought to make by way of amendment after the sex discrimination claim was dismissed. The Tribunal did not allow the amendment, but the EAT allowed the claimant's appeal. The Court of Appeal allowed the employer's further appeal on the basis that the case as pleaded in the Claim Form 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'.

11. That position I consider bears some similarities with the Claim Form of the claimant in this case, which similarly does not in my assessment hint at a claim under the AWR, such that there is I consider an insufficient causative link between what was set out in the Claim Form, and what is now sought to be added by way of amendment. What the claimant now seeks to put forward is an entirely new claim, but one I consider with little if any

reasonable prospects of success. Although the differences may seem to a layman to be minor, they are significant, as was demonstrated in the very recent case of **GTR Ltd v Rodway UKEAT/083/19**. These are factors that tell against allowing the amendment, although they are not conclusive in themselves.

12. Secondly, the applicability of **time limits** is a further factor. That is not a simple matter. It is set out in Regulation 18 of the AWR, and is at best for the claimant for the period of three months from the date of the detriment, which at latest is 26 April 209. Early Conciliation provisions apply. The Claim Form was presented on 1 August 2019, and Early Conciliation commenced on 25 June 2010, but the Claim Form did not include a claim under the AWR.

13. The application to amend is made now, with detail received only on 15 June 2020. It had been referred to earlier, but only in very general terms as a claim that the claimant wished to pursue. The application to amend is approximately nine months late. That is not determinative but it is an important factor. The onus is on the claimant to convince 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***). Whilst that does not mean that it should be construed restrictively, as later authorities made clear.

14. The Tribunal has a reasonably wide discretion on the question of what is just and equitable, but I consider that if this issue was being considered in isolation, purely as one of time-bar, the claim would not be received on the basis that it is not just and equitable to do so. That is primarily as there is material prejudice to the respondent. The delay of nine months is relatively long, particularly when seen in the statutory context of a primary period of three months, and a new claim is made which requires investigation on its own terms. Doing so is not easy as the claim is not clearly articulated. As Ms Batten put it she does not know how to respond, and at the least would require to seek further information from the claimant about the details of the claim either informally or by application for order under Rule 31. The delay is liable to affect recall of witnesses to an extent at least. It would

involve further cost. Whilst the refusal of the amendment would prejudice the claimant, he does have another claim that he can pursue, such that he is not entirely deprived of a potential remedy. Separately, the proposed claim under the AWR has I consider very little if any prospects of success. That is a factor that tells against permitting a claim that is late on the basis that it is just and equitable to do so (see for example the case of ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278*** on very different facts***).*** These are further matters that tell against allowing the amendment although not determinative in themselves. I did however consider the case of ***Galilee v Commissioner of Police of the Metropolis [2018] ICR 634,*** a decision of the EAT to the effect that it was competent to reserve issues of jurisdiction in the context of an amendment for a Final Hearing. That authority however is not entirely consistent with other EAT authorities, particularly ***Amey Services Ltd v Aldridge UKEATS/0007/16***, but in any event I consider that the substantial difficulties with the merits of the proposed amendment in this case, the need for at the very least further specification of what is said to be the breach of the AWR, the further delay and cost involved, the degree of hardship to the respondent and the full circumstances as this Judgment sets out, all combine to make it inappropriate, if it be competent, to reserve that issue and allow the amendment meantime.

15. Thirdly the **timing and manner** of the amendment is to be considered. The application was made after the time it ought to have been which was by 22 May 2020, by a period of over three weeks, when the requirement from that email had been to do so within one week. That direction also followed three earlier Preliminary Hearings. The claimant had been ordered to provide further details of his claim at the first Preliminary Hearing, further orders were made at the third Preliminary Hearing, and the email of 15 May 2020 was sent when a further hearing fixed for 18 May 2020 was discharged after the application made by the claimant. These are factors that once again tell against the allowing of the application.

16. Separately, I do recognise that the claimant is a litigant in person. For someone in his position it is not easy to assess what remedy may be sought, and on what legal basis. Although there had earlier been reference

to his having legal advice he explained that he had not been able to obtain actual detailed advice, and I accepted that he was in all material respects a litigant in person throughout. He explained to me that he had done the best he could, and it was clear that he felt that he had been unfairly treated. These are matters that weigh in the balance in his favour.

17. He does have a separate claim for detriment for having made a protected disclosure, which is addressed in the Note of even date, which is to proceed to a Final Hearing. That means that at least one element of the claim he wishes to make is to proceed. It appeared to me however that a material difficulty for the claimant was that his factual complaints fell most simply into section 100 of the Employment Rights Act 1996, but that remedy is not available to him as only employees can pursue it and the earlier Judgment held that he was not and dismissed that claim. His attempt to use the AWR to obtain a remedy for what are similar factual allegations was I consider in its essentials not well conceived having regard to the terms and context of the AWR.

Conclusion

18. Taking into account all the circumstances, I considered that the proposed amendment ought not to be allowed. The strong weight in the balance of the various factors is against the claimant. The application to amend is substantially out of time, and is a new kind of claim to that set out in the Claim Form. It is not at all easy to identify a competent way to fit the circumstances relied upon into the AWR, and the claim proposed is one that I consider has very little if any reasonable prospects of success. It has been pursued at a very late stage, and even presented much later than the email of 15 May 2020 directed. There would be material prejudice to the respondent, with inevitable greater delay and cost, if the amendment were to be allowed, and further specification would be required in any event. Whilst the claim as to a protected disclosure is different to that proposed, it is proceeding such that the claimant is not entirely deprived of the opportunity of pursuing a claim. If the amendment were to be allowed, and a second respondent convened for alleged breach of the AWR, that would require a further Preliminary Hearing after they were

served with a copy of the Claim Form and related documentation, and would add still further to the cost and delay in finalising the claim, but in the context of a claim with such limited, if any, prospects of success.

19. I have therefore refused the application to amend.

Employment Judge: Sandy Kemp
Date of Judgment: 18 June 2020
Entered in register: 19 June 2020
and copied to parties