



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123830/2018

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Held in Glasgow on 12 June 2019

Employment Judge O'Donnell

10 **Mr R Cowan**

**Claimant
In Person**

15 **Kieron McTear**

**Respondent
No appearance and
No representation**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Claimant's application to amend the name of the Respondent to "McTear Contracts Ltd" is granted.

REASONS

25 **Introduction**

1. The Claimant has brought a complaint of unlawful deduction of wages and breach of contract.

Procedural history

2. The ET1 named the Respondent as "Kieron McTear" and it was served on Mr
30 McTear at the address given on the ET1 .
3. No ET3 was received and a Rule 21 judgment was issued in favour of the Claimant for the sums set out in the ET1.

E.T. Z4 (WR)

4. Subsequently, an application for the Rule 21 judgment to be reconsidered and set aside along with an application for an extension of time to lodge an ET3 was received by solicitors acting for Mr McTear. These applications were granted and the ET3 accepted.

5 5. The fundamental defence raised in the ET3 was that Mr McTear did not employ the Claimant and that no contractual relationship existed between them.

6. The present hearing was listed to determine the correct identity of the Respondent.

10 **Procedure at the hearing**

7. The Respondent did not attend the hearing; he had attended the Tribunal offices the day before on the mistaken understanding that the hearing was due to be heard on that day.

15 8. Attempts were made to contact the Respondent on the day of the hearing and although his offices could be reached, the clerk was informed that he was not at his desk and could not be reached.

9. The solicitor previously acting for the Respondent had come off record some time ago and was no longer involved.

20 10. In the circumstances, where the Respondent was aware of the date of the hearing, efforts had been made to contact him and no application made to postpone the hearing, the Employment Tribunal decided that it would be in keeping with the overriding objective to proceed with the hearing and avoid further delay.

Claimants application to amend

25 11. The Claimant, at the outset of the hearing, accepted that he was not employed by Mr McTear. Based on the contents of his payslip, the Claimant accepted that the correct name of his employer was "McTear Contracts Ltd".

12. The Claimant, therefore, applied to amend the name of the Respondent to “McTear Contracts Ltd”. The Claimant explained that Kieron McTear was the owner and director of the company; everything went through him and the Claimant had always viewed Mr McTear as his employer.

5 13. The Claimant had named his employer as “McTear Contracts” on his ACAS Early Conciliation form but had made an error when completing the ET1.

Relevant Law

14. The Employment Tribunal has a general discretion to allow an amendment of the claim in terms of Rule 29 and 41 of the Rules of Procedure.

10 15. The test to be applied by the Tribunal in determining applications to amend has been laid down in a number of decisions and the fundamental principles can be found in the judgments in *Cocking v Sandhurst (Stationers) Ltd and anor 1974 ICR 650, NIRC and Sefkent Bus Co Ltd v Moore 1996 ICR 836, EAT.*

15 16. Those cases make it clear that the Tribunal must carry out a balancing exercise taking into account all the relevant factors with regard to the interests of justice and the relative hardships either party may face if the application is refused or granted. In particular, the Tribunal should take account of the nature of the amendment, the applicability of time limits and the timing and
20 manner of the application.

Decision

17. The Tribunal, first of all, considered whether to determine the application in the absence of the Respondent. The Tribunal noted that the purpose of the hearing was to determine the identity of the Claimant’s employer and that
25 previous correspondence from the Tribunal had raised the issue of whether an amendment is sought.

18. The issue of amendment was, therefore, one which was live and the Respondent was aware of the hearing. Further, the Mr McTear is the owner and director of the company so would undoubtedly have the authority and

ability to reply on behalf of the company. Had he chosen to attend then he would have had the opportunity to object if he wished.

- 5 19. In these circumstances, the Respondent having had the opportunity to attend and participate in the hearing but not having chosen to do so, the Tribunal considered that it would be in keeping with the overriding objective to determine the application in order to avoid further delay.
- 10 20. Turning to the factors that require to be considered in determining the application, the Tribunal was of the view that the nature of the amendment does not fundamentally alter the cause of action being pursued; the Claimant still seeks the same sums of money on the same basis that he was always sought those sums.
- 15 21. All that the amendment does is correct the error in the ET1 as to the identity of the Respondent. Although Mr McTear and the limited company are technically separate legal entities, Mr McTear is the main actor in the limited company and it cannot, therefore, be said that the legal entity which he controls has been unaware of the claim being pursued.
- 20 22. Further, the limited company was the employer named in the ACAS Early Conciliation process and so it must have been clear, during the Early Conciliation process, that the sums in question were being sought from the company.
- 25 23. In terms of time limits, these would only be relevant where the amendment raises a new cause of action. As noted above, the Tribunal does not consider that the amendment does raise a new cause of action; the cause of action remains the same, that is, that the Claimant seeks monies owed to him by his employer.
24. All the amendment does is correct an error in the identity of the Claimant's employer and, in these circumstances, the Tribunal does not consider that the issue of time limits apply.

25. The application is made at a relatively early stage of these proceedings; although there has been some procedure in this case, this has not involved the resolution of substantive issues.
26. The Tribunal does not consider that this is a case where the passage of time will cause any prejudice or hardship to the Respondent in terms of the ability to defend the claim. The claim relates to a relatively limited set of facts about what monies the Claimant should have been paid at the end of his employment. The Tribunal would expect that, given the Claimant left employment late in 2018, the Respondent would have retained the relevant payroll records and they should not be prevented from being able to defend the claim if there is a dispute about what is owed.
27. If the application was refused then there would be prejudice to the Claimant as the claim could not proceed against the Respondent as named. The Tribunal did take account of the fact that the Claimant may have an alternative remedy in the Sheriff Court but this would mean further delay for the Claimant in resolving this matter and he would effectively have to start the proceedings again.
28. In these circumstances, the Tribunal considered that the balance of prejudice and hardship fell in favour of allowing the application and that it would be in the interests of justice to do so.
29. The application is therefore allowed and the name of the Respondent is amended to "McTear Contracts Ltd". The address for the Respondent remains the same.
30. The Tribunal orders that a fresh ET1 will now be served on the Respondent for them to submit an ET3.

Employment Judge: Peter O'Donnell
Date of Judgment: 26 June 2019
Entered in register: 02 July 2019
and copied to parties