EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4101416/2020 (V)

Preliminary Hearing held remotely at Glasgow on 20 October 2020

Employment Judge D Hoey

Mr R Dickie	**Claimant** **Represented by:** **Himself**
Oakbank Plant Hire Limited	**Respondent** **Represented by:** **Mr Bryce** **(Solicitor)**

JUDGMENT

1. The claimant's application to amend his claim to set out his claim of wrongful dismissal more clearly, as set out in the email dated 29 June 2020, is granted.

2. The respondent's application for strike out of the claim is granted, there being no prospects of success of the claimant establishing any breach of contract. The claim is therefore struck out.

REASONS

1. In his claim form presented on 11 March 2020 the claimant ticked the box indicating that he was claiming unfair dismissal. Early conciliation had commenced on 21 February 2020 with the certificate being issued on 5 March 2020. The claim form stated that the claimant had been with the respondent for almost a year and had been "sacked on the spot", having received no warnings. He noted that it was alleged that he had damaged property but this was disputed by the claimant who believed he had been dismissed because the respondent thought his brother had gone to work for a competitor.

2. As the claimant had less than 2 year's service, he had been asked to confirm whether or not his claim was for wrongful dismissal rather than unfair dismissal. By email dated 29 June 2020 the claimant argued that his claim was that the respondent had failed to follow a contractual disciplinary procedure and as such he sought damages.

3. The respondent argued that the claim as advanced before the Tribunal was for unfair dismissal and in the absence of 2 year's service the claim should not be allowed to proceed. Even if the claim was for wrongful dismissal, which was denied, there was no contractual term that was breached and the claimant had been paid his notice pay.

4. Today's preliminary hearing had been fixed to determine the application to amend together with the respondent's submission that the claim should be struck out, there being no prospects of success, in accordance with the Tribunal Rules.

5. The preliminary hearing took place remotely via CVP with the claimant representing himself and Mr Bryce, solicitor, representing the respondent. Each of the parties was able to participate in the hearing, seen and be seen,

and communicate effectively. The parties also had access to the relevant documents to which reference was made.

6. The Tribunal was satisfied that the arrangements for that hearing had been conducted in accordance with the Practice Direction dated 11 June 2020, and ascertained that the appropriate notice as to that hearing was on the cause list. It was satisfied that the hearing had been conducted in a fair and appropriate manner.

7. The hearing began by my making reference to the overriding objective set out in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, namely that everything that is done is done fairly and justly and to ensure that the parties are on an equal footing.

Amendment

8. The first issue was whether or not the claimant should be allowed to amend his claim to include further specification, thereby making it clear that his claim was for wrongful dismissal and not unfair dismissal.

9. The claimant explained that he did not have the benefit of legal advice and was uncertain as to the legal and procedural position. He understood that by ticking the box "unfair dismissal" he would be able to argue that his dismissal was wrongful and unfair. The claimant accepted he had less than 2 year's service and that his only claim was for wrongful dismissal.

10. The respondent's agent maintained their objection to the amendment being permitted. It was argued that the claim that had been lodged was a claim for unfair dismissal. The early conciliation certificate was in respect of unfair dismissal with the wrongful dismissal claim (specification) being lodged later.

11. The respondent's agent candidly conceded that in fact the wrongful dismissal claim had been submitted within time and there would be little prejudice, if any, to the respondent if the application were granted.

The law regarding amendment

12. The law regarding amendment applications is well settled. It is firstly important to determine the type of amendment sought. An amendment can either be to amend the basis of an existing claim, introduce a new cause of action already linked to facts pleaded or to introduce a wholly new claim not linked to existing facts.

13. Matters of amendment are a part of the Tribunal's general case management powers under Rule 29, which require to be exercised having regard to the overriding objective in Rule 2.

14. An amendment is not automatically to be allowed and the established test summarised by Mummery J (as he then was) in **Selkent Bus Co v Moore** 1996 IRLR 661 **("Selkent")** is to be applied. The prejudice and hardship to the parties is to be considered and carefully balanced. This would include assessing whether any new evidence would be needed and the impact of the amendment on the parties. No one factor is conclusive. Ultimately the matter is to be determined judicially.

15. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. In **Selkent,** Mummery J sets out the criteria for a Tribunal's exercise of discretion in relation to amendment commenting that the Tribunal *"should take into account all the circumstances and should balance the injustice and hardship of refusing* /t". The factors which had influenced its decisions were:

"(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.

(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. "*

16. In *Abercrombie v Aga Rangemaster Ltd [2014] ICR 204* ("Abercrombie") the Court of Appeal said this in relation to an amendment which arguably raises a new cause of action, 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. "*

17. The Tribunal must apply the **Selkent** principles. The Employment Tribunal has a discretion to determine any amendment application and must take into account all the relevant circumstances and then balance the injustice and hardship of allowing an amendment against the injustice and hardship of refusing it.

18. The Tribunal should also apply the overriding objective (as set out in paragraph 2 to Schedule 1 of the Employment Tribunals (constitution and Rules of procedure) Regulations 201 3) in making its decision, making sure any decision taken is fair and just.

19. Amendments should not be denied punitively where there is no real prejudice done by allowing them: **Sefton MBC v Hincks** 201 1 ICR 1357. It is important to balance all the circumstances. It is ultimately a balancing exercise taking all relevant factors into account. No one factor is conclusive.

Decision on amendment

SO 20. This was a case where the basic averments needed to establish the claim had already been set out. Although it was not clear that the claim being advanced was for wrongful dismissal, the claim form makes reference to the failure to

follow the disciplinary procedure, which is what the claimant ultimately argues was contractual.

21. The respondent's agent conceded that the claim was in fact in time and that there was little prejudice to the respondent if the amendment were allowed.

22. Applying the **Selkent** principles, the nature of the amendment is such as to provide more specification of a claim that was, to an extent, foreshadowed in the claim form. There were no material issues of time limits (and even if there were these would only be one factor which would be considered alongside the others). The claimant sought to clarify the position as soon as he understood the issue in question.

23. The prejudice or hardship to the claimant would be far greater if the amendment is refused in comparison to the hardship to the respondent if the amendment is permitted. It is in the interests of justice to allow the claimant to amend his claim to provide clear specification as to the proper basis of his claim.

24. In all the circumstances, it is in the interests of justice to allow the claimant to amend his claim to make it clear that the claim he wishes to advance is one of wrongful dismissal, in that the respondent breached his contract by failing to follow the disciplinary process prior to his dismissal, in circumstances where he says he was dismissed for doing nothing wrong.

25. The amendment application is therefore granted. The claim that needs to be considered is one of wrongful dismissal.

26. The hearing then moved to consider the respondent's application to have the claim struck out.

Application for strike out

27. The respondent's agent argued that there are no prospects of success of the claimant establishing wrongful dismissal. The claimant's contract of employment was clear in stating that the disciplinary process was not contractual. Failure to follow it could not therefore amount to a breach of contract.

28. In any event the claimant had been paid in lieu of his notice, as permitted in terms of his contract.

29. The claimant explained that he had thought the disciplinary procedure was contractual but upon consideration and review of the contract, which he admitted he had signed, he accepted that the disciplinary process was not contractual.

30. The claimant also accepted that he had been paid his contractual notice.

31. The claimant's argument was that he had done nothing wrong and it was unfair to dismiss him given the nature of the industry in which he and the respondent's operated since word of mouth had affected the claimant and he wanted to clear his name.

32. The claimant now understood, however, that his claim of wrongful dismissal had no prospects of success.

The law regarding strike out

33. Under Rule 37 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, an Employment Tribunal may strike out all or part of a claim or response on a number of grounds, including that the claim or response, or some part of either, has no reasonable prospect of success.

34. Rule 37 imports a two-stage test. The first is to consider whether the ground has been established. The second is to consider whether or not to exercise the discretion in favour of striking out. The second stage is important as it involves a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit.

35. In **Hasan v Tesco** UKEAT/98/16, the Employment Appeal Tribunal held that relevant factors in the exercise of that discretion that might have weighed heavily included the early stage of the proceedings, the ability to direct that further and better particulars of each claim be specified and the absence of any application on the part of the respondent for striking out.

36. In determining whether or not there are reasonable prospects of success, strike out should only be ordered where the Tribunal is in a position to conclude that there are no reasonable prospects. If central facts remain in dispute it will only be in an exceptional case that a case is struck out on the grounds that there is no reasonable prospect of success.

Decision - Strike out application

37. The claimant essentially accepted that his claim had no prospects of success. He had misunderstood the terms of his contract and thought that the disciplinary policy was contractual. He had focused on showing the unfairness of the process and the absence of proper investigation and had not checked the contract. The disciplinary process was non-contractual and so a failure to follow it could not amount to a breach of contract.

38. In order to claim wrongful dismissal, a claimant must be able to show that the respondent breached a term of the contract of employment. There must be some term of the contract, express or implied, which was breached. In this case the claimant accepted, correctly, that there was no term of the claimant's

contract which had been breached when the respondent dismissed the claimant.

39. His dismissal may or may not be unfair, but that is not the issue for this Tribunal. The claimant did not have sufficient service to claim unfair dismissal and the issue was whether or not his claim for wrongful dismissal had any prospects of success.

40. Moreover the claimant had been paid his week's notice as required by the terms of his contract. There was therefore no breach of contract at all by the respondent when the claimant was dismissed.

41. There were no prospects of success in this case. There was no contractual term to which the claimant could point which supported his claim for wrongful dismissal (ie breach of contract). The respondent had followed the contract in dismissing the claimant.

42. That did not mean that the claimant was not correct in his assertion that he was innocent of the allegation that led to his dismissal but rather it means that his dismissal was implemented in accordance with the terms of the contract of employment. Given he does not have the requisite service to claim unfair dismissal, he is unable to raise such a claim.

43. In light of the undisputed facts in this case and the applicable law and Rules, the claim has no prospects of success and it is just and proportionate that the claim be struck out.

44. In reaching my decision in relation to this matter I carefully considered the overriding objective. I have concluded that it is not in the interests of justice nor is it proportionate for the claim to proceed.

45. The claim is struck out. That brings the proceedings to an end.

Employment Judge: D Hoey
Date of Judgment: 20 October 2020
Entered in register: 11 November 2020
and copied to parties