EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case no 4102633/2016 (V)

Deliberations in respect of application to amend conducted by means of the Cloud Video Platform on 15 February 2022

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Employment Judge W A Meiklejohn
Tribunal Member Ms M Fisher
Tribunal Member Ms G Powell

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Mr C Purnell	**Claimant** **Represented by:** **Mr D McFadzean - Solicitor**
The Edinburgh Mela Ltd	**Respondent** **Represented by:** **Mr G Wolfson – Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's application to amend is refused.

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REASONS

1. This case came before us for determination of whether or not an application to amend submitted on behalf of the claimant should be granted. We held a judge and members meeting remotely by means of the Cloud Video Platform to deal with this.

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Procedural history

2. This case has a lengthy history which we summarise briefly here. Following a multi-day hearing between November 2016 and May 2019 (much of the delay being attributable to a sist of the proceedings during a police investigation) we issued a Judgment in favour of the claimant. We awarded compensation for automatically unfair dismissal under section 103A of the Employment Rights Act 1996 ("ERA") and for detriment under section 47B ERA. An appeal was lodged with the Employment Appeal Tribunal ("EAT") (UKEATS/0041/19) but this was dismissed in June 2021.

3. An application for expenses was made by the claimant but this was sisted pending the outcome of the appeal. That application for expenses had not been decided prior to the application to amend and remains outstanding.

4. We are aware that the claimant has brought a further claim against the respondent (and Mr E Khan and Mr F Choudhury) which is being resisted (the "new claim"). We have not seen any of the papers in the new claim and our knowledge of it is limited to the references within the application to amend and the respondent's answer to that application.

Application to amend

5. This was initiated in terms of an email dated 21 September 2021 from Mr McFadzean, although not at that point expressed as an application to amend. We were asked that our Judgment against the respondent should be issued against Mr Khan and Mr Choudhury. Mr McFadzean said of Mr Khan and Mr Choudhury that –

"*….they were clearly the officers of the Respondent who were responsible for the events that gave rise to the successful claims by the Claimant."*

6. Mr McFadzean expressed the legal basis for issuing the Judgment against Mr Khan and Mr Choudhury in these terms –

"*….while this case was ongoing the caselaw has developed to make it possible for a judgement to be granted against an individual non-employer respondent in respect of an automatically unfair dismissal/detriment of this kind, whereas previously that was not thought to be possible. We therefore believe that it is competent for the Employment Tribunal to issue a Judgement in respect of all of the awards against Messrs Khan and Choudhury.*"

7. Following a request from the Tribunal for clarification of the basis for this application, Mr McFadzean sent a further email dated 20 October 2021. In this he recognised that what was required was an application under Rule 34 of the Employment Tribunals Rules of Procedure 2013 to add Mr Khan and Mr Choudhury as additional respondents. Reference was made to ***Timis and another v Osipov [2018] EWCA Civ 2321***. The Tribunal treated this email as an application under Rule 34 and invited the respondent to respond to it.

Respondent's answer

8. On 18 January 2022 Mr Wolfson provided written submissions objecting to the application to add Mr Khan and Mr Choudhury as additional respondents. In these submissions there was a challenge to the competency of the application. There were also arguments about the merits and timing of the application.

9. We have given here no more than an overview of the application to amend and the objections to it because we refer in more detail below to the parties' respective arguments. Both parties agreed that the matter should be dealt with on the basis of the written submissions.

Rule 34

10. This is as follows –

Addition, substitution and removal of parties

The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included.

Competence of application to amend

11. Mr McFadzean argued that ***Watts v Seven Kings Motor Co Ltd [1983] ICR 135*** was authority for the proposition that an application to add a new respondent can be granted notwithstanding that a final order has been made in a case. In ***Linbourne v Constable [1993] ICR 698*** the EAT did so and ordered the newly added respondent to pay the compensation awarded.

12. Mr Wolfson said that what was being sought here was for Mr Khan and Mr Choudhury to be added as respondents and for the Tribunal immediately to issue judgment against them and to hold them liable for the award. This was despite the facts that (a) they had never been parties to the claim, (b) the claim had never been served on them, (c) the Tribunal hearing had concluded, (d) the Judgment had been issued and (e) appeal proceedings had also been concluded.

13. Mr Wolfson argued that ***Watts*** and ***Linbourne*** were cases where the purpose of adding a new respondent had been to rectify a mistake. In ***Watts*** the respondent against which the claim was brought was a limited company whereas the true respondent was an individual trading under the same name.

In ***Linbourne*** Mr Constable was the named respondent when it was clear that the employer had been Queens Moat Houses plc.

14. Mr Wolfson pointed out that in ***Watts*** the EAT had been following the guidance provided by the National Industrial Relations Court ("NIRC") in ***Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650*** where the true employer was the parent company and not the erroneously named subsidiary. Mr Wolfson quoted from that guidance –

"(6) In deciding whether or not to exercise their discretion to allow an amendment which will add or substitute a new party, the tribunal should only do so if they are satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause reasonable doubt as to the identity of the person intending to claim or, as the case may be, to be claimed against."

15. Mr Wolfson submitted that it was clear from these cases that what was envisaged was the correction of a mistake to ensure that a judgment was issued against the party who was the intended respondent. That was not the situation here. There was no question of the proceedings having been raised against the wrong party nor any mistake to be rectified. Proceedings were simply not raised against Mr Khan and Mr Choudhury when it would have been permissible for the claimant to have done so.

16. Mr Wolfson highlighted the phrase *"to have determined"* in Rule 34. We understood him to be arguing that (a) this phrase indicated the Rule was not intended to cover the situation where all issues in the case had already been determined and (b) to the extent that there was any exception to this, the relevant authorities indicated that it applied only where there was a genuine issue as to the correct identity of a party.

Decision on competence of application to amend

17. We noted that the antecedent provision of Rule 34 was (or rather was part of) Rule 10 in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (the "2004 Rules"). This was headed "*General power to manage proceedings"* and accordingly its direct successor was Rule 29 in the 2013 Rules. Rule 10(1) of the 2004 Rules stated that it covered the making *"at any time"* of orders which might be any of those listed in Rule 10(2) or such other orders as a chairman thought fit.

18. The examples in Rule 10(2) of the 2004 Rules of orders which could be made included –

"(k) that any person who the chairman or tribunal considers may be liable for the remedy claimed should be made a respondent in the proceedings"

"(r) that any person who the chairman or tribunal considers has an interest in the outcome of the proceedings may be joined as a party to the proceedings"

19. We considered that as the previous Rule contained in the 2004 Rules which Rule 34 replaced allowed the addition of a party "*at any time"*, it was probable that if the intention had been for Rule 34 to be more restrictive (as to the stage of the proceedings at which a party could be added) that would have been stated expressly. We were not persuaded that the language of Rule 34 had the effect we understood Mr Wolfson to be contending for.

20. The issue which arose in ***Watts, Linbourne*** and ***Cocking***, ie mistaken identification of the respondent, might well still arise either during Tribunal proceedings or when they were otherwise concluded. We did not believe that it would be a correct interpretation of Rule 34 to preclude its application in circumstances where the proceedings were otherwise concluded.

21. We were also not persuaded that the application of Rule 34 was limited to correcting the mistaken identification of a respondent, and could not be of wider

effect, when the proceedings were otherwise concluded. The reference in the antecedent Rule 10(1)(k) of the 2004 Rules to a person who *"may be liable for the remedy claimed"* could be argued to mean that it could only be exercised before judgment since, after judgement, the remedy is no longer *"claimed"* but has been awarded. However, the language of Rule 34 was broader. There needed to be –

(a) an issue between the person(s) sought to be added and any of the existing parties falling within the jurisdiction of the Tribunal, which issue

(b) it is in the interests of justice to have determined in the proceedings.

22. In the present case we were satisfied that there was an issue between the claimant and Messrs Khan and Choudhury. That issue was whether Messrs Khan and Choudhury should be liable for the detriment suffered by the claimant. That issue fell within the jurisdiction of the Tribunal. The key question was whether it was in the interests of justice to have that issue determined in these proceedings. We believed that this question should properly be addressed when we considered the claimant's application to amend. It should not be excluded by the operation of Rule 34 as contended for by Mr Wolfson.

23. Accordingly, we found that the application to invoke Rule 34 was competent and should be considered by us on its merits.

Amendment

24. We next considered the relevant case law on applications to amend. In ***Cocking*** the paragraph in the decision of the NIRC immediately following the one quoted above was in these terms –

"*(7) In deciding whether or not to exercise their discretion to allow an amendment, the Tribunal should in every case have regard to all of the circumstances of the case. In particular they should consider any injustice or*

hardship which may be caused to any of the parties including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."

5 25. In ***Selkent Bus Co Ltd v Moore [1996] ICR 836*** the EAT considered a decision of a Tribunal to allow an application to amend. That decision was taken under Rule 13 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993 (the "1993 Rules") which provided as follows –

10 *"Subject to the provisions of these rules, a Tribunal may regulate its own procedure."*

26. The case did not involve adding an additional respondent and the Tribunal's decision was not taken under Rule 17(1) of the 1993 Rules which provided as
15 follows –

"*A Tribunal may at any time, on the application of any person made by notice to the Secretary or of its own motion, direct any person against whom any relief is sought to be joined as a party, and give such consequential directions as it*
20 *considers necessary."*

27. Notwithstanding this, it is generally accepted that Tribunals should follow the guidance in ***Selkent*** when dealing with any application to amend, including one which involves the addition of a party. That guidance, so far as relevant, was
25 expressed in these terms –

"(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
30 *refusing it.*

(5) What are the relevant circumstances? It is impossible and undesirable to list then exhaustively, but the following are certainly relevant:

(a) <u>The nature of the amendment</u>

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 fact 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) <u>The applicability of time limits</u>

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) <u>The timing and manner of the application</u>

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."

Claimant's position

28. In his email of 21 September 2021 Mr McFadzean stated that the respondent had not settled the Tribunal's award in favour of the claimant and had given no suggestion of a willingness to do so. He referred to various matters relating to the conduct of the EAT proceedings.

29. In his email of 20 October 2021 Mr McFadzean argued that –

(a) A worker or agent of the employer can have liability for detriment claims in protected disclosure cases – section 47B(1A) ERA.

(b) Such a worker or agent can be liable for the detriment consisting of the employee's dismissal and compensation for the detriment can include losses flowing from the dismissal – ***Timis v Osipov***.

(c) The liability of Mr Khan and Mr Choudhury should be on a joint and several basis – ***London Borough of Hackney v Sivanandan and others [2011] IRLR 740*** and ***Bungay and another and Sanai and another UKEAT/0331/10***.

30. On 28 September 2021 an application was received at Companies House to have the respondent struck off and dissolved. The application was signed by directors of the respondent including Mr Khan and Mr Choudhury. Mr McFadzean argued that the injustice and hardship to the claimant if the application to amend was refused would be "*extreme*" in that he would be unable to enforce the Judgment against the respondent. He argued that the only injustice to Mr Khan and Mr Choudhury if the application to amend was granted would be *"for them to be called to account for the unlawful actions which the Tribunal has already found them [to] have been responsible for against the Claimant".* Mr McFadzean said that the balance of injustice and hardship favoured the claimant.

31. Mr McFadzean argued that no question of time bar arose because the claims against the respondent were raised timeously. Delay should not be treated as a reason to refuse the application. In relation to the timing of the application, Mr McFadzean argued that the claimant was only in the position of having to make the application to amend because it now appeared that the respondent had no intention of settling the Tribunal's award and, he suggested, its directors had decided not to continue trading because of that award.

32. Mr McFadzean said that the respondent had applied for strike off without notifying the claimant as a creditor, as the law required. This was not behaviour the claimant could have foreseen at the start of his claim. Mr McFadzean argued that there had been unreasonable conduct which was entirely unfair on the claimant.

Respondent's position

33. Mr Wolfson argued that to grant the application to amend would offend the principle of natural justice and the right to a fair trial under Article 6 of the European Convention on Human Rights. Granting the application would render Mr Khan and Mr Choudhury liable without ever having had (a) the claim served on them, (b) the opportunity to obtain legal representation or (c) the chance to defend their position as respondents.

34. Mr Wolfson took issue with the statement in Mr McFadzean's email of 20 October 2021 (quoted in paragraph 30 above) that Mr Khan and Mr Choudhury had already been found responsible for unlawful actions. While the Tribunal had made certain findings in fact in respect of Mr Khan and Mr Choudhury, they were not parties to the proceedings and that was not the same as liability being determined. Mr Wolfson submitted that the Judgment did not determine whether either or both of Messrs Khan and Choudhury were personally responsible for the detriments referred to at paragraph 192 of the Judgment, as opposed to other Board members. Granting the application to amend would have the effect of making them liable by default.

35. Mr Wolfson argued that granting the application would be contrary to the overriding objective to deal with cases fairly and justly which included, so far as practicable, ensuring that the parties were on an equal footing. Messrs Khan and Choudhury would not be on an equal footing with the claimant.

36. In relation to the timing of the application to amend, Mr Wolfson argued that the claimant's reason for seeking to include Messrs Khan and Choudhury was because of events alleged to have taken place after these proceedings had been concluded. He further argued that it would not be fair or just for the Tribunal to take those allegations at face value. They formed part of the new claim. The claimant's allegations were denied in the ET3s submitted in response to the new claim and evidence would require to be led before any determination was made.

37. Referring to ***Timis v Osipov*** Mr Wolfson argued that this did not create new law but rather clarified what the law had been since June 2013. It had been open to the claimant to include Messrs Khan and Choudhury as respondents from the outset and to have claimed for the alleged detriment of dismissal. In any event ***Timis v Osipov*** was not authority for the proposition that new parties could be added to a claim, and judgment issued immediately against them, after proceedings had concluded.

38. Mr Wolfson said that the issue of time bar was a matter which would require to be determined in the new claim. If it was relevant here, then it was significant that over five and a half years had passed between the date of the claimant's resignation in March 2016 and the application to amend in September 2021.

39. Addressing the issue of injustice and hardship, Mr Wolfson said that he understood the Registrar had received an objection to the application to strike off the respondent and that the strike off application had been suspended until May 2022 after which it would continue unless there was a further objection. It was therefore currently unclear when, or if, the respondent would be struck off. Mr Wolfson argued that the injustice and hardship to Messrs Khan and

Choudhury, said to include the risk of bankruptcy, outweighed the injustice and hardship to the claimant.

40. Mr Wolfson did not concede that there should be joint and several liability if the application to amend was granted. Liability for unfair dismissal could lie only with the respondent. If Messrs Khan and Choudhury were added, they would be liable only for detriments, and the only detriments in this case were those referred to at paragraph 192 of the Judgment.

41. Mr Wolfson referred to the principle of finality of litigation. This litigation concluded in May 2019 when the Judgment was issued, or at the latest when the EAT proceedings were concluded.

Decision on application to amend

42. We start by commenting on ***Timis v Osipov***. In that case the Court of Appeal held that –

(a) It is open to an employee to bring a claim under section 47B(1A) ERA against an individual co-worker for subjecting him or her to the detriment of dismissal, ie for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B(1B) ERA. All that section 47B(2) ERA excludes is a claim against the employer in respect of its own act of dismissal.

(b) As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, section 47B(2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and quantification of such losses will apply.

43. Following his dismissal on 27 October 2014, Mr Osipov pursued claims of automatically unfair dismissal on the basis of public interest disclosure, "ordinary" unfair dismissal and public interest detriment. Those were the same

claims as brought by the claimant in the present case. However, unlike the claimant in the present case, Mr Osipov brought his claims against both his former employer, International Petroleum Ltd ("IPL"), and four individuals including Mr Timis and Mr Sage. The Employment Tribunal found in favour of Mr Osipov and against IPL, Mr Timis and Mr Sage. IPL, Mr Timis and Mr Sage appealed unsuccessfully to the EAT. Mr Timis and Mr Sage then appealed unsuccessfully to the Court of Appeal.

44. Mr Wolfson was correct in saying that ***Timis v Osipov*** did not create new law but rather clarified what the law already (from June 2013) was. However, Mr McFadzean was entitled to say that the caselaw had developed because, prior to this case, it was not clear that liability for the detriment of dismissal could be established by means of sections 47B(1A) and 47B(1B) ERA, potentially sidestepping the employer's "*reasonable steps"* defence in section 47B(1D) ERA.

45. Our view of this was that ***Timis v Osipov*** did not assist the claimant here, for two reasons. Firstly, unlike the position in ***Timis v Osipov***, his claim had been pursued from the outset only against the employer and not against individual directors. Secondly, the detriment of dismissal was not one of those we found established by the evidence we heard – indeed, given the terms of section 47B(2) ERA, that could never have been found to be a detriment in a case brought only against the employer.

46. We reminded ourselves that, per ***Cocking*** and ***Selkent***, we should (a) look at all the circumstances and (b) balance the relative injustice and hardship of granting /refusing the application to amend.

47. We have already referred to the circumstances when setting out the parties' respective positions above and we will not rehearse these here. What seemed to us to be reasonably clear was that when payment of the sums we had awarded was not forthcoming after the EAT's decision, the claimant had sought to take steps which might secure payment of all or at least part of those sums. The need to do so might well have been reinforced by the application for strike

off and dissolution of the respondent, although the financial information about the respondent available on the Companies House website prior to that application (showing negative net worth as at 31 March 2020) would hardly have been encouraging.

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48. The key issue for us to decide was the relative injustice and hardship (a) to Mr Khan and Mr Choudhury if we granted the application to amend and (b) to the claimant if we refused it. We looked first at the nature of the amendment.

10 49. This was not one of the *"minor matters"* referred to in ***Selkent***. It was at the other end of the spectrum. The original claim resulting in our Judgment in relation to detriment was brought under section 47B(1) ERA. The proposed amendment was a substantial alteration pleading a new cause of action, engaging section 47B(1A) ERA.

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50. We looked next at the applicability of time limits. The application to amend was made very significantly outwith the time limit in section 48(3) ERA for a detriment claim under section 47B ERA. The only argument we identified as to why it might not have been reasonably practicable for the claimant to present

20 a claim timeously under section 47B(1A) ERA was that the caselaw had developed (the Court of Appeal's decision in ***Timis v Osipov*** having been handed down in October 2018).

51. Finally we looked at the timing and manner of the application. It seemed to us

25 that the most significant factors were (a) the respondent's failure to settle the award after conclusion of the EAT proceedings, (b) the application for strike off and (c) that the caselaw was said to have developed.

52. The injustice and prejudice to Mr Khan and Mr Choudhury if we allowed the

30 amendment arose –

(a) for the reasons contended by Mr Wolfson as set out in paragraphs 33-35 above, with which we agreed, and

(b) because application of the ***Selkent*** guidance pointed away from rather than towards allowing the amendment – the amendment sought to introduce a new cause of action, which would otherwise be out of time, and which came very late in the day.

53. The injustice and prejudice to the claimant arose because he would be denied an opportunity to recover the Tribunal's award (or part of it) from Messrs Khan and Choudhury in circumstances where it appeared inevitable that the respondent would not pay.

54. For the avoidance of doubt, we make no finding that the application for strike off and dissolution of the respondent was made without the requirements of the Companies Act 2006 being fully complied with, nor that this application amounted to a detriment to the claimant. These may be matters to be decided in the new claim brought by the claimant.

55. Our view of the relative injustice and hardship was that the prejudice to Mr Khan and Mr Choudhury outweighed the prejudice to the claimant. We considered that the arguments advanced by Mr Wolfson, as summarised at paragraphs 33-35 above, were correct and were strongly persuasive that it would be wrong to proceed as Mr McFadzean was asking us to do. We also took into account that the claimant would be able to pursue the new claim so that our refusal of the application to amend did not necessarily mean that he would be deprived of any remedy to which he might be found entitled against Mr Khan and Mr Choudhury.

56. Accordingly, our decision is to refuse the application to amend.

Employment Judge: **W Meiklejohn**
Date of Judgment: **22 February 2022**
Entered in register: **24 February 2022**
and copied to parties