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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 3203833/2021 (V)**

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**Held on 24 January 2022 (By Cloud Video Platform)**

**Employment Judge: P O'Donnell**

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**A**

**Claimant**

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**B**

**Respondent  
Represented by:  
Mr Forrest - Counsel  
Instructed by  
Womble Bond Dicks**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The judgment of the Employment Tribunal, given orally at the hearing, is that the Claimant's application to amend her claim is allowed in whole.

**REASONS**

**Introduction**

1. The Claimant has brought a range of complaints against the Respondent, all of which are resisted.

2. The claim was lodged by way of an ET1 presented to the Tribunal in May 2021 . The Respondent lodged their ET3 on a protective basis given that there was an ongoing internal grievance process.
3. A first case management hearing was listed in relation to this case on 25  
5 November 2021. Shortly before that hearing, the Claimant made an application to amend by way of a revised Paper Apart to be substituted for the one which was attached to the ET1. This was done, partly in the context that the Respondent had been seeking further specification of the claims and also in the context that counsel, who had recently been instructed for the Claimant,  
10 took the view that the pleadings required to be adjusted to set out the claim fully.
4. Given that the revised Paper Apart was lodged only a few hours before the November hearing started, directions were made for the application to be addressed and, in particular, to give the Respondent time to instruct their  
15 agents as to whether or not they objected to the amendment.
5. The Respondent did object, in part, to the amendment and so this hearing was listed to determine the application. In summary, the issue between the parties related to the amendments in respect of the claim for disability discrimination; the Respondent said that these sought to raise an entirely new claim  
20 unconnected with the existing claims and was being raised out of time; the Claimant said that this was further specification of a claim that was already pled. Other than that, the Respondent did not object to the content of the revised Paper Apart being substituted for that lodged with the ET1.
6. There was a bundle of documents prepared by the parties for use at the  
25 hearing and a reference to page numbers below are a reference to the pages in that bundle. The Claimant also lodged a short supplementary bundle and where any page in that bundle is referenced below then it is designated "SB".
7. The Tribunal gave an oral judgment at the hearing. By agreement with the parties, the oral judgment indicated whether the application to amend was

granted or not but did not give full reasons at the time with these to follow in writing. This judgment are those written reasons.

**Claimant's submissions**

- 5 8. Counsel for the Claimant adopted the submissions set out in the written application at pp80-99. He indicated that no authorities had been lodged but understood that the relevant principles are not contentious and not disputed by the Respondent.
- 10 9. It was submitted that the amendment seeks to clarify the existing claims; it was accepted that the ET1 had not been pled as well as it could have been and was pled without the assistance of counsel due to issues of funding. The amendment now sets out a focussed claim with a clear legal basis for each factual assertion.
- 15 10. Reference was made to the revised Paper Apart with track changes which starts at p59 and a comparison was made to the original ET1 which starts at p1 with the Paper Apart starting at p16. Counsel then went on to go through the revised Paper Apart to identify those matters to which the Respondent did not object and those to which it did. For the sake of brevity, the Tribunal does not intend to set out the detail of these two exercise but, rather, highlight the main issues which it considers relevant.
- 20 11. It was accepted that the box at Part 8 of the ET1 form was not ticked to indicated that disability was a relevant protected characteristic. However, in the Paper Apart, there was specific reference to a claim under s21 of the Equality Act which can only relate to disability. The Claimant had, therefore, pled a claim of disability discrimination when the ET1 and Paper Apart are read  
25 together.
12. Reference was also made to paragraph 28 of the original Paper Apart (p20) where there is reference to the stress and anxiety which it is said go towards the test of disability.

13. It is submitted that the Claimant would be entitled to run a disability discrimination claim based on the unamended pleadings.

14. The only new fact in the revised Paper Apart appears at p62 and, it is submitted, that the Claimant would be entitled to lead evidence about this in any event.

15. It is submitted that the revised Paper Apart goes on to set out averments relating to the provision, criterion or practice (PCP) relevant to her indirect discrimination claim and the claim regarding the breach of the duty to make reasonable adjustments including details of the group and specific disadvantage sought by the Respondent. It also sets out averments specifying the statutory provision which relates to each factual complaint. Most of the amendment relates to legal matters with only one new fact being introduced.

16. It is wrong of the Respondent to suggest that these are new claims unconnected to the existing claims. If there is any new cause of action then it is inextricably linked to the existing claims.

17. Turning to the test to be applied by the Tribunal in considering the amendment, reference was made to the well-known case of *Selkent* (below); it is a matter of discretion for the Tribunal to determine on the balance of hardship or prejudice to the parties.

18. As regards, the non-exhaustive list of factors set out in *Selkent*, it was submitted that the nature of the amendment is that it is a minor one providing clarification of the existing claim. In terms of timing, it was noted that the ET3 was lodged on a protective basis in circumstances where the Respondent was still conducting the grievance procedure and so still had to lodge their final ET3. In terms of time limits, it was submitted that this was not the type of amendment which gave rise to issues of time limits as it fell into either the first or second category of amendment identified in *Harvey* rather than being a wholly new cause of action.

19. The reason why the amendment was made when it was related to issues of funding and the engagement of counsel being authorised by the Claimant's insurers some time after proceedings had to be raised.

5 20. It was submitted that there would be little prejudice to the Respondent as they still need to lodge their final ET3. There would be a lot of prejudice to both parties in not allowing the amendment as the pleadings would not then be as focussed.

10 21. In rebuttal of matters raised in the Respondent's submissions, it was submitted that the disability discrimination claim was linked to the claims based on other protected characteristics. Specific reference was made to paragraphs 58f and g of the revised Paper Apart (p69).

#### **Respondents submissions**

22. Counsel for the Respondent adopted what was said in the written objections to the Claimant's application at pp101-104.

15 23. Counsel went on to set out a short chronology of the claim breaking it down into a number of different periods.

20 24. It was submitted that the Claimant was seeking to introduce a new claim of disability discrimination, clarify the basis of the existing claims and tidy up the ET1. The claim of disability discrimination was an entirely new claim falling into the third category of amendment identified in *Harvey*.

25 25. Reference was made to the *Selkent* case and the factors identified in that case. In terms of time limits, it was submitted that the disability discrimination claim was plainly out of time. As regards the nature of the amendment, it was submitted that this was substantial and there was nothing in the facts as originally pled from which it could reasonably be inferred that there was a disability discrimination claim. Although the Claimant refers to a label associated with disability discrimination, it was submitted that this was not enough and there needs to be something of substance which there is not. Further, there was nothing in the averments to indicate that the Claimant was

disabled. Finally, in terms of timing and manner of the amendment, it was submitted that this was not dealt with expeditiously.

### Relevant Law

5 26. The Tribunal has a general power to make case management orders which includes the power to allow amendments to a claim or response in terms of Rule 29.

10 27. The case of *Selkent Bus Co Ltd v Moore* [1996] ICR 836 confirms the Tribunal's power to amend is a matter of judicial discretion taking into account all relevant factors and balancing the injustice and hardship to both parties in either allowing or refusing the amendment. The case identifies three particular factors that the Tribunal should bear in mind when exercising this discretion; the nature of the amendment; the applicability of any time limits; the timing and manner of the amendment.

15 28. In relation to time limits, the case of *Transport and General Workers Union v Safeway Stores Ltd* UKEAT/0092/07 confirms that this is a relevant factor in the Tribunal's discretion and can be the determining factor. However, time bar does not apply, in the context of an application to amend an existing claim, to automatically bar a new cause of action in the same way as it would if the new cause of action was being presented by way of a fresh ET1.

### 20 Decision

25 29. Given that the Respondent does not object to certain parts of the amendment, the Tribunal would allow the amendment in relation to those matters on the basis that they are not opposed and it would be in keeping with the Overriding Objective to allow the amendment to that extent given that it provides the Respondent and the Tribunal with a clear specification of the claims under the Equality Act based on the protected characteristics of sex and pregnancy/maternity as well as the claim for wages.

30. The matter for determination is the disputed element of the amendment relating to the claims under the Equality Act based on the protected characteristic of disability. Turning to that determination, the Tribunal considers that it is appropriate to address each of the specific factors highlighted in *Selkent*,  
5 consider any other relevant factors and then take all of those into account in balancing the injustice and hardship to all sides.

31. First, there is the issue of the nature of the amendment itself, specifically the element of the amendment to which the Respondent objects. This relates to the claims of disability discrimination and the Tribunal considers that the  
10 starting point is to assess the extent to which such claims are pled in the original ET1.

32. The Paper Apart to the ET1 does expressly state that a claim under s21 of the Equality Act is being pursued alleging a breach of the duty to make reasonable  
15 adjustments and the Tribunal agrees with the submissions made on behalf of the Claimant that such a claim can only relate to the protected characteristic of disability. The box on the ET1 form relating to disability was not ticked but that is not determinative of what claims are being pursued and the pleadings have to be read as a whole need to be take into account.

33. The ET1 also indicates that a claim of harassment under s26 of the Equality  
20 Act is being pursued but does not expressly state that this claim is based on the protected characteristic of disability and the Tribunal can well understand why the Respondent would have read the ET1 as raising a harassment claim based only on the protected characteristics of sex and pregnancy/maternity.

34. The ET1 does not go on to expressly set out the basis of any disability  
25 discrimination claim in detailed terms. For example, although averments are made which relate to the Claimant's health and medical conditions, there is nothing in the ET1 which expressly sets out that these medical conditions are said to be a disability as defined in s6 of the Equality Act and the averments in question read more as describing the impact of the alleged discrimination on  
30 the Claimant.

35. Similarly, although the phrase “reasonable adjustments” is used in the ET1 as originally pled, it does not appear in a context which sets out how the duty to make reasonable adjustments is engaged.

5 36. However, the Tribunal does consider that it is significant that, whilst the original pleadings may not have fully specified the legal basis of any claims being pursued, the factual matrix on which the various claims are based are fully pled. In particular, the matters on which the claims of disability discrimination are based are set out in the original pleadings and the amendment does not seek to adduce any new facts in relation to those claims.

10 37. What the amendment seeks to do (in relation to all the claims being advanced) is specify the legal basis of the claims being pursued and identify what alleged acts by the Respondent are said to be unlawful under the specific provisions of the Equality Act.

15 38. In relation to the disability discrimination claims, the amendment specifies the basis on which it is said the Claimant is “disabled” for the purposes of the Equality Act. It then goes on to identify what is said to be the alleged harassment relating to disability; it is worth noting that the alleged conduct by the Respondent giving rise to the disability harassment claim is also said to amount to harassment relating to sex or pregnancy/maternity. The amendment also sets out the basis on which the duty to make reasonable adjustment is engaged.

20 39. The Tribunal does consider that, taking account of all of these matters, the amendment is one which seeks to further specify claims which were raised in the ET1 as originally pled. Although there may have been some confusion about whether disability was a relevant protected characteristic given that the box on the ET1 was not ticked, the Paper Apart does specifically plead a breach of the duty to make reasonable adjustments (which can only relate to disability) and makes reference to reasonable adjustments in the narrative, albeit without the level of detail which would be required to give the Respondent fair notice of these claims. Given these matters, the Tribunal does not consider that the amendment, insofar as it relates to the duty to make reasonable

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adjustments, raises a wholly new cause of action and that it is further specification of matters already pled.

40. There is no question that harassment is raised in the original pleadings as one of the types of discrimination claim being advanced. It is, however, difficult to discern that disability is one of the relevant protected characteristics for this claim given that it is not exclusive to that protected characteristic.

41. The Tribunal considers that the amendment in relation to the harassment claim is simply one which provides further specification that disability is a protected characteristic relevant to that claim in the same way that the other elements of the amendment (to which no objection was made) specify what matters amount to harassment in relation to the other protected characteristics.

42. At most, the amendment in relation to the harassment claim is one which seeks to add a cause of action which arises out of the same facts or is linked to the existing claims rather than raising a wholly new cause of action. As noted above, the factual matrix on which the disability harassment claim is based was pled in the original ET1 (and is relied upon as the basis for harassment claims relying on sex and pregnancy/maternity) and no new facts are being introduced in the amendment.

43. Second, there is the issue of the applicability of time limits. Given the Tribunal's findings that the disputed elements of the amendment do not raise a wholly new cause of action and, rather, are specification of existing claims or a new claim arising out of the same facts as the existing claims, this factor does not come into play.

44. Third, there is the factor as to the timing and manner of the application. The application comes early in the case management process being made in advance of the first case management hearing (albeit only a few hours before that hearing).

45. The Tribunal does note that there was a long period of time between the ET 1 being lodged and the case management hearing in November 2021; the claim was originally dealt with in England before being transferred to Scotland and the hearing date was listed by the English Tribunal.

5 46. In any event, this is not a case where the application was made late in the process or shortly before a substantive hearing which might necessitate a delay in the case management process or postpone of any such hearing.

47. It is also significant that the Respondent was seeking further specification of the claims being advanced and the amendment satisfies this request. The  
10 Tribunal notes that the Respondent does not say that they still do not have fair notice of the case they have to answer even in the event that the amendment is allowed.

48. Having addressed the specific factors identified in *Selkent*, the Tribunal considered whether there were any other relevant factors. It could not identify  
15 any other relevant factors and the parties had not raised any.

49. Turning to the balance of injustice and hardship between the parties, the Tribunal considered that this was a case where there would be a hardship to both parties in refusing the application. If the amendment was not allowed then parties would left in a position where the issues for determination would  
20 not be clear and would require particularisation; the Respondent had already indicated that they sought further specification and this request would undoubtedly be renewed if the original pleadings remained in place.

50. There would also then be the issue of whether the Claimant could advance her disability discrimination claims. It was said on her behalf that it would be  
25 maintained that such claims were before the Tribunal based on the original pleadings and there would have to be some resolution of that issue before the final hearing which is listed for March 2022.

51. The most that could be said that the Respondent would be potentially facing disability discrimination claims that they may (emphasis added) not otherwise have faced on the basis of the original pleadings. However, as set out above, any such claims arose from the facts already pled in the original ET1 and they were not facing any new factual averments. Indeed, in respect of the harassment claim they would be answering a case based on other protected characteristics arising from the same facts.

52. It was said that one of the relevant witnesses was no longer employed by the Respondent and, indeed, no longer in the country. However, that witness, on the face of the pleadings, was not directly relevant to the factual matters giving rise to the disability discrimination claims. In any event, the Respondent is still in contact with this witness as they have made an application for him to give evidence remotely at the final hearing and, if there was any concern about preserving his evidence, they could have taken a precognition or statement from him before he left. The Tribunal does not consider that this matter weighs heavily against allowing the amendment.

53. In these circumstances, taking account of all the matters set out above, the Tribunal allows the Claimant's application to amend her ET1 to substitute the revised Paper Apart for that originally lodged with the ET1.

54. After hearing submissions in relation to the amendment application, the Tribunal went on to deal with matters of case management. The Orders made by the Tribunal and Note of the discussion on case management issues will be sent under separate cover.

**Employment Judge: P O'Donnell**  
**Date of Judgment: 04 February 2022**  
**Entered in register: 08 February 2022**  
**and copied to parties**