



EMPLOYMENT TRIBUNALS

Claimant: N Scott

Respondent: Garden County Vending Limited

Heard at: London South Employment Tribunal by video

On: 31 January 2022

Before: Employment Judge L Burge

Appearances

For the Claimant: In Person

For the Respondent: D Smith, Chartered Legal Executive

OPEN PRELIMINARY HEARING JUDGMENT

The Judgment of the Tribunal is that:

1. The Respondent's application that the Tribunal has no jurisdiction to hear the Claimant's unfair dismissal claim is successful; and
2. The Claimant's applications to amend her claims to include claims of Whistleblowing and unfair dismissal are granted

REASONS

JUDGMENT having been given orally at the hearing on 31 January 2022 and written reasons having been requested by the Respondent at the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

1. The Open Preliminary Hearing was listed for 3 hours and lasted 3 hours and 25 minutes.
2. The Tribunal was provided with a bundle of 76 pages.

3. At an earlier telephone case management hearing on 6 July 2021 the issues had been discussed, the Respondent raised a question over the jurisdiction of the Tribunal to hear a constructive dismissal claim and the Claimant raised that she wanted to include a claim of whistleblowing. At the time of the hearing a judicial mediation was scheduled and so the decision was taken to leave these issues until after the judicial mediation. The Claimant wrote an email on the same day applying for an amendment to her claim. The judicial mediation did not go ahead.
4. In the Particulars, the Claimant had set out her complaints in detail under the headings “sexual Harassment/Innuendos”, “Verbal Abuse”, “constructive Dismissal/Intimidating Behaviour/Slander” and “Extra Information”. The Claimant is a litigant in person. She had received legal advice for the purposes of a negotiation but did not have legal advice otherwise. As set out in her claim form, the Claimant had complaints of Victimisation, Sexual Harassment and Harassment on the grounds of sex before the Tribunal, but these were not in issue at this Preliminary hearing. The issues for the Tribunal in this Preliminary hearing were therefore:
 - a. Does the Tribunal have jurisdiction to hear the Claimant’s complaint of Unfair Dismissal?
 - b. Can the Claimant amend her claim to include a complaint of constructive unfair dismissal; and
 - c. Can the Claimant amend her claim to include a complaint of whistleblowing?

A. Respondent’s application - No Jurisdiction to hear the Unfair Dismissal claim

1. It was agreed between the parties that the Claimant submitted her claim while she was still in employment and one of her claims was for constructive unfair dismissal. The Claimant said that she was off sick at the time, she knew that the Respondent’s intention was to let her go, there was no way she could return.

Law

2. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provide:

Rejection: substantive defects

12.—(1) *The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—*

(a) one which the Tribunal has no jurisdiction to consider; or

(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process.

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a) or (b) of paragraph (1).

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge’s reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

...

Initial consideration

26.—(1) As soon as possible after the acceptance of the response, the Employment Judge shall consider all of the documents held by the Tribunal in relation to the claim, to confirm whether there are arguable complaints and defences within the jurisdiction of the Tribunal (and for that purpose the Judge may order a party to provide further information).

(2) Except in a case where notice is given under rule 27 or 28, the Judge conducting the initial consideration shall make a case management order (unless made already), which may deal with the listing of a preliminary or final hearing, and may propose judicial mediation or other forms of dispute resolution.

Decision

3. Given that she was still in employment the Claimant did not have a claim for unfair dismissal at the point in time when she submitted her claim. She had not been dismissed. I decided that when the claim form was submitted the Tribunal should have rejected her claim of constructive unfair dismissal under Rules 12 and 26 as the Tribunal had no jurisdiction to hear her claim.

B. Claimant's application to amend her claim to include a complaint of unfair dismissal

4. I was aware that there was an inequality of arms – the Respondent was legally represented and had been throughout, but the Claimant was not and had no legal experience. I therefore asked the Claimant if she would like to amend her claim to include a complaint of unfair dismissal which she did. She said that because of the treatment she was subjected to at the Respondent she already knew she had lost her job; the Respondent was interviewing other candidates.
5. The Respondent said that the complaint was out of time, she had previously received legal advice, the balance of hardship and injustice lay with the Respondent if the amendment were to be allowed. The Respondent submitted that the merits of the claim were weak as the Claimant waited too long to resign, she accepted sick pay and she left for another job rather than because of the treatment.

Law

6. In the case of *Selkent Bus Co Ltd v Moore* 1996 ICR 836, EAT the discretion is to be exercised in accordance with the over-riding objective and taking into account all the circumstances, including:
 - a. the nature and extent of the amendment
 - b. its timing (including any applicable time limits and the implications of the amendment in terms of impact on the trial timetable or costs)
 - c. its merits (where those are obvious, there being no point in adding an amendment to bring a hopeless claim)
 - d. the relative prejudice/hardship to the parties of either granting or refusing it.
7. In *Abercrombie and others v Aga Rangemaster Ltd* [2014] ICR 209 Underhill LJ, with whom the rest of the Court agreed, said:

“...the approach of both the EAT and this court in considering applications to amend which arguably raise new causes of action has been 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 the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted.”

[...]

“Mummery LJ says in his guidance in Selkent Bus Co Ltd v Moore [1996] ICR 836 that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and a fortiori in a relabelling case – justice does not require the same approach.”

8. In *Vaughan v Modality Partnership* 2021 ICR 535, the Employment Appeal Tribunal confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application.
9. The Presidential Guidance on General Case Management states at paragraphs 6 and 7:
 6. *The Tribunal draws a distinction between amendments as follows:*
 - 6.1 *those that seek to add or to substitute a new claim arising out of the same facts as the original claim; and*
 - 6.2 *those that add a new claim entirely unconnected with the original claim.*
 7. *In deciding whether the proposed amendment is within the scope of an existing claim or whether it constitutes an entirely new claim, the entirety of the claim form must be considered.”*
10. In *Prakash v Wolverhampton City Council* EAT 0140/06 the Employment Appeal Tribunal held that a Tribunal has jurisdiction to exercise its discretion to allow a claim that is presented prematurely to be amended so as to permit a claim to be included that could not have been included when the claim form was originally presented, because the claim had accrued at a later date.

Decision

11. The claim form set out, at length, the behaviour that the Claimant says led to her assertion that she was constructively unfairly dismissed. She is a litigant in person, the Respondent has known the details of this claim since the claim form

was lodged, looking at the entirety of the claim form it is a new legal label based on those facts. In respect of the merits, while it appears the Claimant waited to resign, she had reason for doing so and so it cannot be said that the claim is without merit. The balance of injustice and hardship would lie firmly on the Claimant were she not to be allowed to amend her claim.

12. Time limits are a factor but are not wholly relevant in this case. In relation to the timing of this application, this is the first time that it has been decided by the Tribunal that it has no jurisdiction to hear the Claimant's claim of constructive unfair dismissal and so her application is timely. In accordance with *Prakash* I exercise my discretion to allow the Claimant to amend her claim to include a claim of constructive unfair dismissal even though it did not arise at the time she submitted her claim.

C. Claimant's application to amend her claim to include a complaint of whistleblowing

13. The Claimant wanted to amend her claim to include whistleblowing. She said that she had been clear to the Respondent at the time, in her grievance and communications with ACAS about what she was complaining about and they were also set out in her claim form. The Claimant said she did not understand what "whistleblowing" was and was unfamiliar with the term. She had stood up for the other employees and received bad treatment for doing so.
14. The Respondent objected on the grounds that they considered it a substantial amendment that introduced an entirely new cause of action, it was significantly out of time, there was no particularisation of the claim and the Respondent would suffer undue prejudice if the application was permitted.

Law

15. I have set out the relevant law relating to amendments in section B above.

Decision

16. Again, looking at the entirety of the claim form, much of the detail of the claims is here, although it is not labelled as "whistleblowing":
 - a. "Paul Woodard continuously went against Government advice and regulations regarding COVID-19 safety in the workplace."
 - b. "Paul Woodard flouted Health & Safety Regulations by transporting his dog in the same vehicle that he transported company stock in."
 - c. "Paul Woodard claimed that he didn't have a company car so that he didn't have to pay the tax on it but there is solid proof that company vehicles are parked at his home in the evenings and at weekends."
17. The facts detailing the alleged detriments were also in the claim form:
 - a. "I received an email stating "Please add £100 per month to the salaries of Pam Smith and Patrick Harding" and no mention of my pay rise."
 - b. "The attendance file has been mislaid within the office and Paul Woodard accused me of stealing it. He also accused me of paying staff more

- monies than due even though he signs the wages off. I asked him to show me proof of the accusations, but he ignored me. I have since found out that he asked the Finance Director on 21st August 2020 to start disciplinary action against me for stealing”.
- c. “17th August 2020: I was informed by a member of staff that Paul Woodard has been telling some of the staff that I had been stealing from the office.”
 - d. “18th August 2020: Paul Woodard told me and Emma Gearing to furlough ourselves for the next day because he was holding interviews for new admin staff who would be learning a new invoicing system that only they would be trained to use.”
 - e. “I received an email formalising my "verbal warning" and he also added two more matters which hadn't been mentioned before.”
 - f. “14th September 2020: Paul Woodard accused me of stealing again. Two workmen turned up to fix screens up on my desk so that I could safely train the new employee to learn my job.”
 - g. “The attendance file has been mislaid within the office and Paul Woodard accused me of stealing it. He also accused me of paying staff more monies than due even though he signs the wages off. I asked him to show me proof of the accusations but he ignored me. I have since found out that he asked the Finance Director on 21st August 2020 to start disciplinary action against me for stealing. On 14th September he found the file in his locked desk drawer.”
18. There were also numerous examples of the Respondent making inappropriate comments and jokes about the issues the Claimant had raised. The claim form sets out information showing alleged wrongdoing and the detriments that the Claimant says she was subjected to, although the claim form does not give the dates of the disclosures. The Claimant applied to amend her claim at the previous hearing on 6 July 2022. She is a litigant in person. Looking at the entirety of the claim form, the information is there, it is a re-labelling and so justice does not require strict application of the time limits. The balance of injustice and hardship would lie firmly on the Claimant were she not to be allowed to amend her claim. I therefore grant her application to amend her claim to include a claim of whistleblowing.

EJ L Burge

4 February 2022