



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112381/2021

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Open Preliminary Hearing Held by CVP on Monday 14 March 2022 at 10.00am

Employment Judge: Russell Bradley

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Sean McGettigan

Claimant
In person

Northstone (NI) Ltd

Respondent
Ms M Jenkins
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's application to amend his claim by introducing a claim of unfair (constructive) dismissal is refused.

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REASONS

Introduction

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1. On 8 November 2021 the claimant presented an ET1. Together with a paper apart headed "**Claim Description**" he made claims including one of an unlawful deduction from his wages. They did not include a claim of constructive dismissal. The claims were resisted. The respondent's Grounds of Resistance are dated 16 December.

2. On 24 January 2022 a telephone case management preliminary hearing was conducted by EJ Sutherland. The parties were represented then as they were

E.T. Z4 (WR)

in this hearing. Agendas were submitted by both in advance. In the Order and Note which followed, the tribunal noted that the Claimant made a complaint of unlawful deduction from wages and for whistleblowing detriment/dismissal (see its paragraph 12). On the latter, the tribunal noted (at paragraph 16) that the claimant asserted that “*he made a protected disclosure (i.e. blew the whistle) on 19 July 2021 (i.e. over a month after his effective date of termination). The Claimant understands that a complaint for whistleblowing detriment/ dismissal logically requires the detriment or dismissal to arise after the whistleblowing (such that it was a reason for the detriment or dismissal). It is understood following discussion that the Claimant is not insisting upon this complaint.*” That claim was subsequently “*rescinded*” by the claimant. In a judgement of the tribunal copied to parties on 9 March 2022 the claim, insofar as it related to a detriment or dismissal for making a protected disclosure under S47B and S103A of the Employment Rights Act 1996, was dismissed under Rule 52 of the Employment Tribunal Rules of Procedure 2013.

3. From the PH, EJ Sutherland also noted (paragraph 18) “*The Claimant in his agenda for today’s hearing referenced a complaint of constructive unfair dismissal. The Claimant must within a period of 14 days submit any application to amend to include a complaint of constructive unfair dismissal setting out the acts or omissions (including the dates and perpetrators of those acts) said to constitute the repudiatory breach of contract, the relevant contractual term (e.g. implied duty of trust and confidence), why it was not reasonably practicable to submit this complaint within 3 months of termination and why it would be reasonable to extend the time allowed.*” On 6 February the claimant wrote to record (amongst other things) his wish to apply to amend the claim to include constructive dismissal. I say more about that document below. By email on 16 February his application was opposed. This hearing was then fixed.

4. The notice of hearing provided that the issue for this hearing was the claimant's application to amend including any issue of time bar. Reflecting the relevant law, the issues became:-

- 5 1. Should the claimant's application to amend his claim by introducing a claim of unfair (constructive) dismissal be allowed? That question to be answered taking account of;
2. Whether the claim is made in time; if not, was it reasonably practicable to have been made in time? And if not reasonably practicable was it made within a reasonable time thereafter?

10 **Evidence**

5. There was no hearing bundle. I had read a number of documents from the tribunal file prior to the hearing.
6. I heard evidence from the claimant who was cross examined. To the extent that reference was made in his evidence or where both parties made reference
15 to them in submissions, I took account of the material within the tribunal file.

Findings in Fact

7. From the evidence, the early conciliation certificate and the Tribunal forms, I found the following facts admitted or proved.
8. The claimant is Sean Liam McGettigan. He was employed by the respondent
20 between 25 June 2018 and 18 June 2021.
9. The claimant began early conciliation on 15 September 2021. The certificate was issued on 27 October.
10. On 8 November the claimant presented an ET1 form. At box 8 (page 6 of the
25 form) he indicated that he was owed other payments. He did not indicate there that he made a claim of unfair dismissal "*(including constructive dismissal)*". He also indicated that he was making another type of claim which the Employment Tribunal can deal with. He then set out that the nature of the claim was threefold: -

1. Unlawful deduction of salary pursuant to Section 13 of the Employment Rights Act 1996
 2. The contractual provisions relied upon by the respondent to justify a deduction were (a) a Penalty Clause and/or (b) an unlawful restraint of trade.
 3. Public Interest Disclosure Act 1998.
11. The paper apart enumerated three items of claim. Two of them specified the statutory provision on which they respectively relied. All three narrated "*Facts*" on which each relied.
12. The extended limitation date (the date by which a claim of constructive dismissal could have been timeously presented taking account of early conciliation) was (agreed as being) 27 November 2021.
13. On or about 16 December 2021 an ET3 with a paper apart was lodged by the respondent.
14. On 17 December, the claimant lodged an agenda for a case management preliminary hearing. The agenda was in large part completed. It provided further details of the complaint based on the making of a protected disclosure.
15. In answer to the headline question (at 2.5 in the form), "*Do you make any other complaints?*" the claimant's agenda said, "*Constructive Dismissal due to Northstone (NI) Ltd trading as Farrans Construction committing a serious breach of contract.*"
16. On or about 19 January 2022 the respondent lodged an agenda for the preliminary hearing. In it and in answer to the questions "*Are there any preliminary issues or jurisdictional issues? If so, what are they? Is a further preliminary hearing required to determine these issues?*" the respondent said, "*Yes. In the Claimant's preliminary hearing agenda at 2.5 he seeks to include a new head of claim for constructive unfair dismissal. The claim as pled in the ET1 is for: "1. Unlawful deduction of salary pursuant to Section 13 of the*

5 *Employment Rights Act 1996. 2. The contractual provisions relied upon by the respondent to justify a deduction were (a) a Penalty clause and/or (b) an unlawful restraint of trade. 3. Public Interest Disclosure Act 1998” The Claimant did not select “unfair dismissal” from the list of potential claims on page 6 of the ET1. The Claimant has not made an application to the Tribunal to amend his claim and requires to do this if he intends to pursue this as a new head of claim. The Respondent reserves the right to object to any such application to amend the claim by the Claimant and raise issues of time bar. A further preliminary hearing to consider the amendment application and potential time bar may be required.”*

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17. On 20 January 2022 the Claimant intimated to the Respondent and the Tribunal a document entitled “*Additional Claim*”. At the preliminary hearing he confirmed that this was intimation of a claim for equal pay under the Equality Act 2010. That claim was subsequently rescinded by him.
- 15 18. One of the various Orders made on 24 January 2022 at the preliminary hearing was that “*The Claimant must within a period of 14 days (i.e. by 7 February 2022) submit any application to amend to include a complaint of constructive unfair dismissal including the details sought in the following Note.*” Those details are set out at paragraph 3 above.
- 20 19. On 6 February the claimant submitted a 16 page document (albeit it is not numbered). It dealt with a number of issues arising from the preliminary hearing. Under the heading of “**Claims**” (on page 9) the claimant referenced three claims. The third was of constructive dismissal. The text then following on that page up to and including page 15 was the claimant’s answer to the various details required of him by the tribunal’s Order of 24 January. The text
- 25 begins, “*The claimant wishes to apply to amend their claim to include constructive dismissal.*”
20. On page 9 the claimant says, “*The basis of this claim is the implied term of trust and confidence (ITTC) that employers and employees are bound to. The Respondent acted in a manner that resulted in damage to the relationship of*
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mutual trust and affected the mental wellbeing of the Claimant. The Respondent neglected the Claimant's basic needs as an employee and showed a lack of duty of care in responding to him. This is in relation to the numerous requests for clarity surrounding role, responsibility and pay substantiation. The Respondent also acted unlawfully and immorally in claiming a staff member (The Claimant) for working on a project – The Claimant was encouraged to lie to a Client to ensure confirmation and payment of time spent on a project. The below timeline sets out the efforts the Claimant made surrounding role, responsibility and pay substantiation.” The timeline referred to begins in February 2020. It ends in May 2021. He refers to an allegation as being “the final straw that caused the unfair dismissal.” The claimant’s narrative within the timeline contains various criticisms of the respondent including issues being unanswered and promises unfulfilled. In large measure they raise factual issues which are not rehearsed either in the ET1, its paper apart or anywhere else in the claimant’s paperwork in this case.

21. The claimant was aware of the various issues relied on in support of his claim of constructive dismissal before his resignation. He was aware of and complied with the time limit for presenting his claim of an unlawful deduction of wages.
22. By 20 January 2022 he sought to add a claim of equal pay. By that date he knew how to add a claim.
23. The claimant was not able to obtain legal advice about his claims in 2021. For a time following the termination of his contract he did not understand the difference between unfair dismissal and constructive dismissal.
24. On 17 February the claimant emailed the tribunal with comments on the respondent’s objections to his amendment application. In his email, he made reference to the Limitation Act 1980; CPR 17.4 and the case of **Galilee v Commissioner of Police of the Metropolis** [2018] ICR 634

Submissions

25. Both parties made oral submissions. I do not repeat them. To some extent, in his submission the claimant sought to give additional evidence. His email of 17 February arguably set out a more structured argument in support of his application. In summary it; suggested that the balance of justice lay in granting it; made a number of criticisms of the respondent's conduct of the case to date; argued that the fundamental information in relation to his detriment claim was substantially the same as that which underlies his constructive dismissal claim; referred to the Limitation Act 1980 section 35 and CPR 17.4 and argued that under reference to **Galilee**, his amendment takes effect for the purpose of limitation at the time permission is granted to amend the claim which in this case was the preliminary hearing on 24 January.

26. In large measure Ms Jenkins's submission was a repeat of what was said in her objection email of 16 February. She referred to the well-known decision in the case of **Selkent Bus Co Ltd v Moore** [1996] ICR 836. She noted three factors from that case and sought to summarise relevant aspects of this case in the context of each. She argued that this is not a relabelling case (as the claimant suggested). In contrast, the claimant is seeking to introduce a new case based on new factual averments which extend over a significant period and which, if allowed, would require a substantial recasting of the ET3. She reminded me that even if this application is refused, the claimant's claim of an unlawful deduction of wages remained. In summary and taking account of the relevant factors from **Selkent**, the balance of justice (or injustice) favoured refusal of the claimant's application.

25 **The law**

27. *"There is no specific provision in the Employment Tribunals Rules of Procedures 2013 (as amended) which governs amendments, but the Employment Tribunal is required by rule 2 to seek to give effect to the overriding objective of dealing with the case fairly and justly."* (**Pontoon (Europe) Ltd v Sinh** UKEAT/0094/18/LA UKEAT/0213/18/LA. The decision of the EAT in **Selkent** (cited by the respondent) contains general guidance to

employment tribunals in relation to amendments (recognised as such in the Court of Appeal in **Ali v. Office of National Statistics** [2005] IRLR 201). I refer to it below.

28. Section 94 of the Employment Rights Act 1996 provides for the right of employees not to be unfairly dismissed. Section 95(1) of that Act provides that for that right an employee is dismissed in one of three circumstances. One of them, section 95(1)(c), is where the employee terminates the contract, commonly called constructive dismissal.

Discussion and decision

29. It is convenient to set out the guidance from the EAT in **Selkent**.

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 refusing it. What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant. (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 addition 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, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978. (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 Regulations of 1993 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.

15 30. In my view the nature of the amendment proposed in this case is to introduce a new claim; that of unfair constructive dismissal. I do not agree with the claimant that this is a relabelling exercise. Even if in his ET1 the claimant made a claim of unfair dismissal it was brought under section 103A, i.e., that he made a protected disclosure. As noted at paragraph 2 above, the claimant appears to have accepted that, given the timing, that claim should be withdrawn. He now seeks to assert an alternative and new basis to claim that his dismissal was unfair (under section 95 of the 1996 Act) and based on a series of incidents spanning a period beginning February 2020. Its basis is an allegation of a breach of the implied term of trust and confidence. It relies on the last straw doctrine. It hardly needs saying that this is a new claim. Its factual and legal bases are new.

31. The claimant accepted when asked by me that the claim is out of time. He accepted that to have been in time it should have been presented by 27 November 2021. By 17 December 2021 he was aware of his right to claim constructive dismissal. It was asserted as another complaint within his agenda. In his email of 17 February, he refers to the decision of the EAT in **Galilee**

wherein the first conclusion (paragraph 109) is that “*amendments to pleadings in the employment tribunal, which introduce new claims or causes of action take effect for the purposes of limitation at the time permission is given to amend.*” Even if in this case permission was given at the preliminary hearing
5 on 24 January the claim was at that date almost two months out of time. I considered whether in those circumstances time should be extended. In my view it should not. On the claimant’s evidence he was aware at the time of presenting his ET1 of all of the circumstances on which he seeks to rely in his claim of constructive dismissal. He was also aware of the right to claim unfair
10 dismissal, albeit under section 103A. In my view it was reasonably practicable for the claim to have been presented in time. Separately on his own case, he was aware of the right to make the claim by at latest 17 December. Even if I accepted that it had not been reasonably practicable to claim in time, the claimant clearly could have done so by 17 December. Separately yet still, by
15 20 January he sought to make an additional claim. By that date he knew how to assert an additional claim. In my view, even if it was not reasonably practicable to claim in time, the claim was not presented within a reasonable time thereafter. The claimant’s evidence was that he did not have legal advice at the time. I do not accept (given the claimant’s own state of knowledge by at
20 latest 17 December) that the absence of legal advice was a reasonable excuse for not seeking to amend in this claim before 24 January.

32. I accept that delay *per se* is not a determining factor, but it is relevant. Were the amendment to be allowed, the respondent would require to revise its
25 pleadings taking account of factual matters now over two years old. That would put the respondent to additional cost and would result in a further delay in these proceedings. All of these issues weigh against the claimant.

33. I am required to balance the hardship and injustice to the claimant in refusing
30 his amendment and the injustice to the respondent in allowing it. I accept that if allowed the respondent would require to answer (including in all likelihood at

a final hearing with evidence) a new claim. I also accept that it could be put to significant costs in doing so. The obvious injustice and prejudice to the claimant is the loss of this claim. But as Ms Morgan said, a refusal of the claimant's application does not deprive him of a hearing, or a right to rehearse relevant evidence to support his claim that he has suffered an unlawful deduction from his wages. In my view the balance favours the refusal of the application.

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34. For all of these reasons, the proposed amendment should not be allowed, and it is therefore refused.

35. I record for the sake of completeness that as was pointed out by the respondent (and by me) neither the Limitation Act 1980 (see section 41) nor the Civil Procedure Rules apply in Scotland.

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Employment Judge: Russell Bradley
Date of Judgment: 17 March 2022
Entered in register: 18 March 2022
and copied to parties