



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101272/2022

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Held via Cloud Video Platform (CVP) on 23 June 2022

Employment Judge P O'Donnell

10 **Mr C Williams**

**Claimant
In Person**

15 **South Lanarkshire Council**

**Respondent
Represented by:
Ms M Lunny -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the Employment Tribunal, given orally at the hearing, is that the Claimant's application to amend his ET1 to add a claim of direct sex discrimination is granted.

REASONS

Introduction

25 1. The Claimant has brought complaints of unfair dismissal and notice pay against the Respondent. At a case management hearing on 11 May 2022 he indicated that he wished to pursue a discrimination claim under the Equality Act 2010 and it was explained to him that no such claim was pled on his ET1. On 16 May 2022, the Claimant made an application to amend his
30 claim to add a discrimination claim. This was opposed by the Respondent and the present hearing was listed to determine the amendment application.

2. The amendment states that the protected characteristic relied on is "sexual orientation" but the terms of the proposed claim describes an alleged difference in treatment between the Claimant and those of the opposite sex.

This suggests that it is “sex” which is the relevant protected characteristic. The Tribunal sought clarification from the Claimant at the outset of the hearing and he confirmed that the claim he seeks to add is one of sex discrimination.

3. The terms of the amendment set out a difference in treatment and, on the face of it, the claim is one of direct discrimination. The Tribunal sought clarification of this from the Claimant and he confirmed this was correct.
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4. The hearing, therefore, proceeded on the understanding that the claim which the Claimant sought to add was one of direct sex discrimination in the terms set out in his email of 16 May 2022.

10 **Claimant’s submissions**

5. The Claimant made submissions which were primarily focussed on the substantive issues of the proposed claim. With no criticism intended of the Claimant who the Tribunal recognises is a party litigant, the detail of these will not be set out for the sake of brevity.
- 15 6. The Claimant did submit that the issue of the information which he had provided being ignored by the investigating officer was a matter which he believed was relevant to the *Burchell* test.
7. In relation to series of questions from the Tribunal about how the claim came to be lodged in the terms which it was and how the amendment came about, the Claimant made the following submissions:-
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- a. He only found out about the normal time limit shortly before it was due to expire when he was speaking to the CAB about another matter.
- b. He could not recall if he filled out the ET1 form or if someone filled it out for him over the phone. He was speaking to a number of people such as ACAS and CAB over a very short period of time to try to meet the time limit.
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- c. He recalled looking at one form and trying to find a box to tick for “sexual orientation” and could not find it. He could not recall if this was the ET1.

- d. He first realised that the ET1 did not include a discrimination claim at the preliminary hearing on 11 May 2022. He did not have a copy of the ET1.
8. The Claimant had had to deal with these matters without legal support.
- 5 9. After the parties concluded their submissions and whilst there was an adjournment for the Tribunal to deliberate, the Claimant sent two emails with documents to the clerk by email. These emails were not copied to the Respondent's agent and the Claimant is reminded that all correspondence to the Tribunal should be copied to the other side.
- 10 10. The Tribunal took no account of these additional documents in coming to its decision.

Respondent's submissions

11. The Respondent's agent made the following submissions.
12. Reference was made to ss13 and 23 of the Equality Act 2010 in relation to
15 the issue of comparators. It was submitted that the Claimant had failed to identify a comparator with the necessary detail.
13. In terms of the timing of the application, it was appreciated that the Claimant was a party litigant but the onus was still on him to seek advice and act
20 timeously. It was submitted that the Claimant's explanation was inadequate. The application is being made some time down the line where a final has been listed for September 2022.
14. It was submitted that there was more prejudice to the Respondent because the application was late, lacked specification and there was no good reason why it was being added at this late stage.

Relevant Law

15. 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.
- 5 16. 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; 10 the timing and manner of the amendment.
17. 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, 15 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.
18. The provisions relating to the time limit for bringing a claim under the Equality Act 2010 to the Employment Tribunal is set out in s123 of the 2010 Act:-
- 20 (1) *Subject to section 140B [a reference to the provision extending time for ACAS Early Conciliation] proceedings on a complaint within section 120 [the section giving the power to the Tribunal to hear claims under the Act] may not be brought after the end of—*
- (a) *the period of 3 months starting with the date of the act to which 25 the complaint relates, or*
- (b) *such other period as the employment tribunal thinks just and equitable.*
19. The Tribunal does have a broad discretion to hear a claim out of time under s123(1)(b) of the 2010 Act. *In British Coal Corpn v Keeble* [1997] IRLR 336,

it was suggested that the factors set out below are ones which the Tribunal should take into account in exercising its discretion. However, in subsequent decisions it was made clear that the Tribunal has been given a very wide discretion under the 2010 Act and it should not treat these factors as a “checklist” (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] ICR D5) but, rather, take into account all relevant factors with no one factor being determinative.

20. The length and reason for any delay as well as the question of any prejudice to the Respondent arising from the delay have been said to always be relevant factor (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] IRLR 1050) although requires to bear in mind that no one factor is determinative.

21. The factors which may be relevant to the exercise of the Tribunal’s discretion are:-

- a. the length of and reasons for the delay;
- b. the extent to which the cogency of the evidence is likely to be affected by the delay;
- c. the extent to which the party sued had co-operated with any requests for information;
- d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;
- e. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

22. The burden of proof in the exercise of the discretion lies on the Claimant and past cases have made it clear that it should be the exception and not the rule, with no expectation that the Tribunal would automatically extend time (*Robertson v Bexley Community Centre* [2003] IRLR 434). This does not, however, mean that exceptional circumstances are required for the Tribunal to exercise its discretion and the test remains what the Tribunal considers to

be just and equitable (*Pathan v South London Islamic Centre UKEAT/0312/13*).

Decision

23. The Tribunal considers that it is appropriate to address each of the specific factors highlighted in *Selkent*, consider any other relevant factors and then take all of those into account in balancing the injustice and hardship to all sides.
24. First, there is the nature of the amendment itself which is to add a claim of direct sex discrimination under s13 of the Equality Act 2010.
25. In this regard, the nature of the amendment is one that seeks to add a new cause of action. However, this is not a wholly new matter and the discrimination claim is one which is inextricably linked to the existing claim of unfair dismissal.
26. In particular, the basis of the proposed discrimination claim is that the investigating officer refused to take account of certain information provided by the Claimant as part of the disciplinary process that led to the Claimant's dismissal. The Claimant alleges that they would not have done so if a female employee had produced such information in the same circumstances and that this amounts to direct sex discrimination. In his submissions, the Claimant made reference to this in the context of the Burchell test which would be applied by the Tribunal in determining the unfair dismissal claim.
27. The Claimant is, therefore, relying on facts in support of the discrimination claim which form part of the potential factual matrix which the Tribunal will require to consider in hearing the unfair dismissal claim.
28. In these circumstances, the nature of the amendment is to add a new cause of action arising from the same set of facts.
29. Second, there is the issue of the applicability of time limits. Given that the amendment is a new cause of action (albeit one arising from the same set of

facts as the existing claim), time limits do apply and the new claim is being raised out of time.

30. In these circumstances, the fact that a claim lodged now would be out of time is not fatal to the application to amend and the Tribunal should, in particular,
5 take account of any discretion it has to hear claims out of time.
31. In this case, the test for exercising its discretion is the just and equitable test and, in considering that discretion, the Tribunal takes account of the following factors some of which are also relevant to the issues the Tribunal has to assess in considering the amendment application:-
- 10 a. The reason for the discrimination claim not being raised in time is that it was not included on the ET1 in error, either by the Claimant or by someone completing it for him.
- b. The delay in the claim being raised is relatively short; the normal time limit (as extended by ACAS Early Conciliation) would have expired at
15 the end of February 2022 and the amendment application was made on 16 May 2022.
- c. The amendment was raised shortly after the first case management hearing on 11 May 2022 when it was identified to the Claimant that his
20 ET1 form did not contain a discrimination claim. This is not a case where the Claimant has sat on his hands and he acted timeously once he became aware that the discrimination claim is missing.
- d. The discrimination claim arises from the same facts as the unfair dismissal claim and the Respondent does not require to call new or additional witnesses.
- 25 32. In these circumstances, the Tribunal does consider that it would exercise its discretion under s123 of the Equality Act to hear the amended claim out of time and so the issue of time limits does not weigh against the Claimant.
33. Third, there is the factor as to the timing and manner of the application. As noted above, the amendment was made very early in the case management

process, only a few days after the case management hearing on 11 May 2022 when it was identified that there was no discrimination claim on the face of the ET1.

34. A final hearing has been listed for September but this is almost three months away. This is not a case where the amendment is seeking to add a new cause of action shortly before the final hearing which might necessitate a postponement or might lengthen that hearing. The Tribunal considers that there is more than enough time for parties to prepare to deal with the discrimination claim at the final hearing and there was no suggestion that this additional claim would lengthen that hearing.
35. Having addressed the specific factors identified in *Selkent*, the Tribunal considered whether there were any other relevant factors.
36. The Tribunal was not being asked to assess the prospects of success at this hearing and did not consider that the merits of the case was a factor which should feature heavily in its consideration. In particular, the discrimination claim is one which can only be assessed after the Tribunal sitting in the final hearing had heard all the evidence and given consideration to what inferences it can draw from the primary facts found by it.
37. It is noted that the Respondent has criticised the specification of the discrimination claim with a focus on the issue of comparators. The Tribunal does take account of the fact that the Claimant is a litigant-in-person and so cannot be expected to set out his claim in the terms which a lawyer would. Bearing that in mind, the Tribunal does consider that the terms of the Claimant's email of 16 May 2022 does give fair notice that he is relying on a hypothetical, rather than an actual, comparator; the third paragraph is clearly setting out the hypothetical scenario of how the Claimant asserts a female employee would have been treated in the same circumstances as him.
38. In any event, a lack of specification would not, on its own, be sufficient to refuse the application and a more appropriate course in such circumstances, which would be in keeping with the Overriding Objective, would be to allow the amendment and make an Order for further specification. However, in this

case, the Tribunal considers that no specification is necessary but the Respondent is at liberty to seek same.

39. Turning to the balance of injustice and hardship between the parties, the Tribunal considered that there would be an injustice and hardship to the Claimant in refusing the application as he would be prevented from pursuing the discrimination claim. He would not be wholly prevented from seeking a remedy for his dismissal as the unfair dismissal claim would remain live.
40. The question then is whether there is any injustice or hardship for the Respondent.
41. The Tribunal does accept that the Respondent may consider that there is a hardship in that they now have to deal with a claim (and face a liability) that they did not previously. However, the Tribunal does not consider that this is a significant hardship; the Respondent has the opportunity to defend the claim and there was no suggestion that they are somehow prevented from doing so or that their ability to do so was prejudiced by the fact that the claim has been brought shortly after the expiry of the time limit.
42. For example, it is not being said that additional witnesses would be required who may now be difficult to contact. Indeed, on the face of it, the same witnesses would be required to defend the discrimination as would be required for the unfair dismissal claim.
43. Similarly, it is not being suggested that those witnesses would require to give significant additional evidence which might be affected by the passage of time. On the face of it, they would be giving very much the same evidence about the investigation and disciplinary process which would be given in relation to the unfair dismissal claim.
44. Further, it was not submitted that the amendment would require the final hearing to be postponed or lengthened. As noted above, the Tribunal considers that there is more than sufficient time for parties to prepare to deal with the discrimination claim at the final hearing listed in September.

45. The Tribunal considers that, although there may be some injustice and hardship to the Respondent in allowing the amendment, this does not outweigh the hardship and injustice to the Claimant in refusing it.
46. In these circumstances, taking account of all the matters set out above, the Tribunal allows the application to add the claim of direct sex discrimination as set out in the Claimant's email of 16 May 2022.
47. As a result of allowing the amendment, there are two consequent case management matters to be addressed.
48. First, the Respondent will require to revise their ET3 to give the Claimant fair notice of their defence to the discrimination claim. The Tribunal directs that the Respondent will lodge a revised grounds of resistance setting out their defence to the claim of direct sex discrimination, as so advised, within 21 days of the date of this hearing.
49. Second, the final hearing will now be before a full panel and so the Tribunal varies the direction at paragraph 14d of the Note of the Preliminary Hearing on 11 May 2022 in respect of the number of copies of the bundle to be lodged with the Tribunal to four.
50. After the Tribunal gave its oral judgment, there was discussion of two further case management issues:-
- a. Ms Lunny indicated that the Respondent may lodge further particulars of their defence to the unfair dismissal claim. The Tribunal indicated that they were at liberty to do so and the direction above did not prohibit or limit this.
 - b. There was a discussion about what documents could be added to the bundle. Whilst the Tribunal appreciates that parties may have differing views as to the relevance of a particular document or documents, unless there are issues of admissibility or issues around the volume of any potentially irrelevant documents, the bundle should contain all documents which each party wishes to rely on and the question of relevance can be assessed by the Tribunal hearing the

final hearing who will be the best place to make such an assessment
having heard all the evidence.

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Employment Judge: Peter O'Donnell
Date of Judgment: 24 June 2022
Entered in register: 24 June 2022
and copied to parties

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