EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4108988/21 (V)

Held on 3 March 2022 by CVP

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Employment Judge N M Hosie

15 **Mr J G Lawrynowicz**	**Claimant** **In Person**
Bidvest Noonan (UK) Limited	**Respondent** 20 **Represented by:** **Mr C Crow, Counsel** **Instructed by** **Fieldfisher LLP**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

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1. the claimant's application to amend is refused; and

2. the claim is struck out in terms of Rules 37(1)(a) and (b) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) 35 Regulations 2013.

REASONS

Introduction

1. This case called before me by way of a Preliminary Hearing to consider the following issues:-

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- Whether the claimant should be allowed to amend his claim.

- Whether the claim should be struck out in terms of Rule 37(1)(b) in Schedule 1 of the Tribunal Rules of Procedure on the grounds of unreasonable conduct in the bringing of proceedings.

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- Whether the claim should be struck out in terms of Rule 37(1)(a) on the basis that it has "*no reasonable prospect of success*".

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- Whether the claimant has provided the evidence necessary to prove "disability" status in terms of s.6 of the Equality Act 2010.

Evidence

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2. I heard evidence from the claimant at the Preliminary Hearing. I was also provided with a bundle of documentary productions ("P"). At the conclusion of the Hearing, I heard submissions from both parties. The respondent's Counsel spoke to written submissions which are referred to for their terms.

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Respondent's designation

3. The respondent's Counsel asserted that the correct designation for the respondent is "Bidvest Noonan (UK) Limited" ("Bidvest"), following Bidvest's acquisition of Cordant Security Limited in 2021 (P68). As there was no objection from the claimant and nothing to suggest that was not so, I amended the respondent's designation accordingly.

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Claimant's amendment application

4. The claimant made an application to amend by letter dated 4 October 2021 (P49/50). In short, he sought to withdraw certain complaints he had intimated and to bring complaints of constructive unfair dismissal and discrimination. His application, in so far as it related to the "new" complaints, was opposed by the respondent.

Chronology

5. Helpfully, in his written submissions the respondent's Counsel detailed a chronology of events relevant to the amendment application. I was satisfied that this chronology was accurate. It is in the following terms:-

Date	Event	Comment
December 2017	Incident at work – C spat at by member of public	Not 2019, as suggested in some of the medical notes
December 2019	Alleged act of religious discrimination – refusal of day off for annual leave [51]	The date of the refusal is not specified but must pre-date 24.12.19.
March 2020	Alleged incidents of disability discrimination and failure to make reasonable adjustments [51-52]	
12 – 31st May 2020	Alleged non-payment of SSP	Relevant to the Constructive Dismissal case
28 – 29th June 2020	ACAS conciliation [4]	NB: pre-EDT, C was sufficiently aware of process to engage in early conciliation but denies knowledge of time limit
30th March 2021	ET1 submitted [5]	Contains none of the claims now sought to be added by amendment
7th June 2021	PH before EJ Hendry [30-	No identification of a pleaded

	34]	discrimination claim; confirmation that UD claim not pleaded
25th June 2021	C's letter explaining delay in submitting original ET1 [35-6]	Despite the guidance of EJ Hendry, no amended pleading or particulars of discrimination or UD complaint provided.
10th September 2021	PH before EJ Hosie [44-48]	Confirmation that C "wishes to advance complaints of constructive unfair dismissal and discrimination" which "were not intimated in the claim form". Amendment necessary. Directions provided as to format of amendment [45 §5 – 47 §9]. R contends these directions have still not been fully complied with.
4th October 2021	Letter referring to application to amend [49-50]	Amended pleading in fact dated 7th October 2021 [51-3]
7th October 2021	Amended claim	[51-3], without sufficient particularisation/non-compliance with ET order
31st October 2021	Further written particulars from C [57]	Continued non-compliance with ET order
11th November 2021	Hearing before EJ Hosie [58-61]	Finding of non-compliance [59] at §4. Further orders for particularisation.
2nd December 2021	Further particularisation/pleading [62-3]	Still non-compliant (no Eq Act references, no explanation of link to protected characteristics).
23rd December 2021	ET order for Further GoR	

	by 7th January 2022 [67]	
7th January 2021	Further GoR filed/served [75], [68-74]	
14th January 2022	Initial response to questions from K. Krawiec [95]	
25th February 2022	Written responses of K. Krawiec [108]	

6. By letter dated 4 October 2021, the claimant applied to amend his claim by "adding" complaints of constructive unfair dismissal and discrimination (P49-50). By letter dated 7 October 2021, the claimant intimated that he wished to bring a complaint of disability discrimination "and failure to make reasonable adjustments" and also "*religious discrimination in the workplace*" (P51-52). This was in response to directions which I had given in the Note which I issued following a case management Preliminary Hearing on 10 September 2021 (P44-48). The claimant's application to amend was opposed by the respondent.

Discussion and Conclusion

7. I do not take issue with the legal principles set out by Counsel in his written submissions.

8. In ***Cocking v Sandhurst (Stationers) Limited & another*** [1974] ICR 650, Sir John Donaldson, delivering the Judgment of the NIRC, laid down a general procedure for Tribunals to follow when deciding whether to allow amendments. These guidelines have been approved in several subsequent cases and were re-stated in ***Selkent Bus Co Limited v Moore*** [1996] ICR 836. In that case, the EAT emphasised that the Tribunal, in determining whether to grant an application to amend, must carry out a careful balancing exercise of the relevant factors, having regard to the interests of justice and to the relative hardship that will be caused to parties by granting or refusing the amendment. Useful guidance on this issue was also given by the EAT in

Argyll & Clyde Health Board v Foulds & others UKEATS/009/06/RN and ***Transport & General Workers Union v Safeway Stores Limited*** UKEAT/0092/07/LA.

9. In both these cases, the EAT referred, with approval, to the terms of paragraph [311.03], in section P1 of Harvey on Industrial Relations in Employment Law:-

> "***(b) Altering Existing Claims and Making New Claims [311.03]***
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> *A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action which is linked to, or arises out of the same facts, as the original claim; and (iii) amendments which add or substitute a wholly or new cause of action which is not connected to the original at all*"

Valuable guidance was also provided by Mummery LJ at pages 843 and 844 in ***Selkent***:-

> "*……………………………………………………………………………….*
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> *(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 granting the amendment against the injustice and hardship of refusing it.*
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> *(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*
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>> *(a) The nature of the amendment*
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>> *Applications to amend have many different kinds, ranging on the one hand from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substituting a further label for facts already pleaded to, to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claims. 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 the new complaint or cause of action is proposed to be added by way of amendment it is essential for the Tribunal to consider whether the complaint is out of time, and if so, whether the time limit could be extended under the applicable statutory provisions e.g. in the case of unfair dismissal s.67 of the Employment Protection (Consolidation) Act 1978 (now section 111(2) of the Employment Rights Act 1996).

(c) The timing and the 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 (now the 2013 Regulations). 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 and information appearing from documents disclosed in discovery. Whenever taking any facts into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting amendments. Questions of delay, as a result of adjournment and additional costs particularly if they are unlikely to be recovered by the successful party are relevant in reaching a decision"

10. When considering the issue, I was also mindful of guidance of the EAT in the recent case, ***Vaughan v Modality Partnership*** UKEAT/0147/20/BA. In that case, the principles surrounding an amendment application were summarised by HHJ Tayler.

Nature of the Amendment

11. The claimant application was a substantial alteration. It sought to introduce new causes of action. I recorded that that was so, in the Note which I issued following the case management Preliminary Hearing on 10 September 2021 (P45, para 4).

Applicability of Time Limits

12. The new complaints in the proposed amendment are significantly out of time. Helpfully, at para 8.4 of his written submissions, Counsel calculated the delays for each of them, beyond the expiry of the time limit. I was satisfied that his calculations were accurate. These are as follows:-

Religious discrimination:	> 1 year 8 months
Disability harassment:	> 1 year 4 months
Reasonable adjustments:	> 1 year 2 months
Constructive unfair dismissal:	> 1 year 32 days

13. While I was mindful that in relation to an application to amend time bar is not determinative, I considered, nevertheless, whether I would have exercised my discretion and allowed the claims to proceed although out of time. I heard evidence from the claimant about this. The reasons he gave for the delay in submitting these new complaints in time were an ignorance of the time limits and his mental health condition. There was included within the bundle medical reports from NHS Highland dated 11 December 2019, 10 February 2020 and 14 April 2020 (P79, 80 and 39).

Discrimination
"Just and equitable" extension

14. The 3 month time limit for bringing a discrimination complaint is not absolute: Employment Tribunals have discretion to extend the time limit for presenting a complaint where they think it "just and equitable" to do so – s.123(1)(b) of the Equality Act 2010 ("the 2010 Act"). Tribunals thus have a broader discretion under discrimination law than they do in unfair dismissal cases as

the Employment Rights Act 1996 provides that the time limit for presenting an unfair dismissal complaint can only be extended if the claimant shows that it was "*not reasonably practicable*" to present the claim in time.

5 15. In determining whether I would exercise my discretion and allow the discrimination complaints to proceed, I found the guidance in **British Coal Corporation v Keeble & others** [1997] IRLR 336 to be helpful. In that case the EAT suggested that Employment Tribunals would be assisted by considering the factors listed in s.33 of the Limitation Act 1980 which deals
10 with the exercise of discretion in civil courts and personal injury cases. However, in doing so I remained mindful of the recent Court of Appeal case, ***Adedaji v University Hospital Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23. In that case the Court reviewed a number of recent cases involving the Limitation Act factors cited in ***British Coal*** : *"The best approach*
15 *for a Tribunal when considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, 'the length of, and the reasons for the delay'. If it checks those factors against the list in Keeble, well and good; but I would not recommend*
20 *taking it as the framework for its thinking"*.

16. The Tribunal has a wide discretion under the 2010 Act to consider whether to allow in a claim out of time; the relevance of the factors in **British Coal**
25 depends on the facts of the particular case.

Prejudice

17. Were I to decide not to exercise my discretion to extend the time limit, then
30 the claimant would be prejudiced as he will not be able to pursue these new complaints. On the other hand, were I to allow the amendment the respondent will be prejudiced in having to defend additional complaints , there will be delay and further expense will be incurred not only in conducting the proceedings but also in investigating matters which occurred some years

ago. It is also unlikely that the respondent would be able to recover these additional expenses, even if it successfully defended the claim. I would also be allowing the claimant to proceed with complaints in respect of which otherwise the Tribunal would have no jurisdiction. In my view, the balance of prejudice favours the respondent.

Alternative Remedy

18. Were I to decide not to exercise my discretion the claimant will still be able to pursue the claims which he was minded to pursue in the first instance.

Delay

19. Clearly, this was a very significant factor indeed in the present case, as the delays beyond the expiry of the time limits were all over 1 year for each of the complaints.

20. Further, it was clear from the terms of the claim form, subsequent correspondence, the claimant's involvement in the case management Preliminary Hearings and the manner in which he gave evidence at the Preliminary Hearing, that he is well able to articulate his position and identify the nature of his complaints, notwithstanding the fact that he is unrepresented and English is not his first language.

21. Although the claimant has no experience of Employment Tribunal proceedings he was able to submit a claim form without the benefit of advice. The time limits for bringing claims can readily be ascertained by reasonable enquiry, for example by way of a simple internet search.

22. Nor was I persuaded, on the basis of the claimant's own evidence and the medical reports which were produced, that his mental health condition was a factor in the very significant delay in bringing these new complaints.

23. Were I to exercise my discretion and allow these new complaints to be introduced, by the time of any Final Hearing witnesses would be required to recall events that occurred some years ago. In that event, I would be concerned with regard to the cogency of the evidence and whether there could be a fair Hearing in such circumstances.

24. While I have a wide discretion to extend the time limit and that the just and equitable "escape clause" in relation to discrimination complaints is much wider than that relating to unfair dismissal complaints, I was also mindful of such cases as ***Robertson v Bexley Community Centre*** [2003] IRLR 434 in which the Court of Appeal stated that when Employment Tribunals consider exercising this discretion:

> *"There is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion* ***is the exception rather than the rule****"* (my emphasis)

25. I arrived at the view, therefore, and I am bound to say without a great deal of difficulty, that there was no impediment to the claimant submitting these new complaints in time; that the length of the delay was a material factor and that the balance of prejudice favoured the respondent. The application to amend to introduce these new complaints is so out of time and the reasons given quite insufficient to engage the just and equitable discretion.

26. Had I been required, therefore, to address the time bar issue on its own and not in the context of an application to amend, in all the circumstances, and weighing all these factors in the balance I would have decided that it would not be just and equitable to exercise my discretion and extend the time limits in respect of the discrimination complaints.

Unfair Dismissal

"Not reasonably practicable extension"

27. As I recorded above, the just and equitable extension is wider and less onerous than the requirement in unfair dismissal cases for a claimant to establish it was "*not reasonably practicable*" to present the complaint in time. It follows, therefore, from my reasoning in relation to the just and equitable extension, that had I been required to do so I would not have exercised my discretion and extended the time limit in respect of the unfair dismissal complaint.

28. However, for the purposes of considering the claimant's application to amend, time bar is not determinative, as Mummery LJ said in ***Selkent***. It is but one factor to be considered, in the round, albeit an important one, particularly in the circumstances of the present case.

The Timing and Manner of the Application/Prejudice and Hardship

29. As I recorded above, there was no impediment, in my view, to the claimant bringing these new complaints in good time and were I to allow the amendment further specification would be required and the respondent would be put to considerable additional expense investigating the new allegations and responding. It would also mean that any Final Hearing would be considerably longer and more expensive.

30. I am of the view, therefore, that the balance of prejudice/hardship clearly favours the respondent.

Conclusion

31. For all these reasons, therefore, and also having regard to the "overriding objective" in the Rules of Procedure, I arrived at the view that the claimant's application to amend should be refused.

"Strike Out: Unreasonable Conduct in the Prosecution of Claims"

32. Rule 37 in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is in the following terms:-

"***Striking Out***

37 *– (1) At any stage of these proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –*

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above".

33. The respondent's Counsel submitted that the claim should be struck out as the manner in which the claimant conducted proceedings had been "unreasonable", in terms of Rule 37(1)(b). He made the following submissions in this regard:-

C remains non-compliant with the clear orders of the Tribunal.

The case to be met remains unclear, leaving the Tribunal and or the Respondent to 'fill in the blanks'.

> *Account has to be taken of the claimant's unrepresented status. However, that has been done in the attempts made by the Tribunal to attempt to assist C to set out his case. It remains the case that the same rules apply to litigants in person as represented parties. R is entitled to know the case it must meet and C does not appear capable of providing that information in a comprehensible form".*

34. When considering this issue, I was mindful that the claimant was unrepresented and had no experience of Employment Tribunal proceedings and that there is always a concern about striking out a claim against a litigant in person on the basis of a failure to plead his case.

35. However, when I considered the history of the case and the opportunities which had been afforded to the claimant to plead his case properly and the guidance which had been given to him, I was satisfied that the submissions by the claimant's Counsel were well founded. I refer, in particular, to EJ Hendry's Note which he issued following the case management Preliminary Hearing on 7 June (P30-34); the Note which I issued following the case management Preliminary Hearing on 10 September 2021 (P44-48); and the Note which I issued following the case management Preliminary Hearing on 11 November 2021 (P58-61). Despite the Orders and Directions in these Notes and the guidance given to the claimant as to what was required of him and reference to the relevant case law, the claimant failed to respond in any meaningful way to the directions and failed to provide the respondent with fair notice of the complaints he wishes to pursue, along with the facts relied upon in relation to each of these complaints.

36. Further, at the Preliminary Hearing the claimant was unable to provide any satisfactory explanation as to why he had failed to do so and as I recorded above though English is not his first language and although he had health issues, there was no impediment to him doing so.

37. I arrived at the view, therefore, that the manner in which the claimant had been conducted by the claimant was unreasonable. Accordingly, the claim is struck out in its entirety in terms of Rule 37(1)(b).

Strike Out: Non Compliance with Orders

38. I also wish to record that, had I been required to do so, I would also have struck out the claim for non-compliance with Orders of the Tribunal, in terms of Rule 37(1)(c). These Orders were clearly set out in the Notes which were issued following the case management Preliminary Hearings, but, as I recorded above, they were never responded to or fully complied with by the claimant, in any meaningful way despite him being afforded ample opportunity to do so.

"Strike Out: No Reasonable Prospects of Success"

39. For the sake of completeness, I also wish to record that I was satisfied that the following submissions by the respondent's Counsel were well founded:-

> *"The religious discrimination case is forlorn and certainly without reasonable prospects. C has pleaded no facts which might give rise to a prima facie case that the refusal of annual leave on 24.12.19 was because of his religion/belief. It is not known how the claimant might go about proving that his comparator has no faith/is an 'unbeliever' or that R knew of this."*

Disability Status

40. Although I am not required to do so, having decided to refuse the claimant's application to amend and to strike out the claim, for the sake of completeness I wish to record that I was also satisfied that the submissions by the respondent's Counsel in this regard were well founded. On the evidence, and having regard to the lack of medical evidence in support of the claimant's allegations concerning the adverse effect of his alleged impairments at the material time, namely the alleged discriminatory treatment, the claimant failed to establish he was disabled, in terms of s.6 of the Equality Act 2010.

41. Had I been required to do so, therefore, I would have dismissed the disability discrimination complaints for that reason.

5 **Employment Judge** **Hosie**

Dated: **28th April 2022**

Date Sent to Parties: **28th April 2022**

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