EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102914/2016

Preliminary Hearing held by CVP on 26 July 2022

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Employment Judge McFatridge

Mr E Borland	**Claimant** **In person**
Fife Council	**Respondent** **Represented by** **Ms Macara,** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's application to amend his claim is refused.

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REASONS

1. The claimant submitted a claim to the Tribunal in 2016 as part of a multiple claim where various men and women asserted that their rights to equal pay had been infringed by the respondent. The claim was submitted by a firm of solicitors. The respondent submitted a response in which they denied the claim. Thereafter, the claim was subject to a degree of case management. At some point in 2021 the solicitors who had been acting for the claimant and others indicated that they were withdrawing from

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acting for a number of claimants. In accordance with the usual Tribunal practice these claimants were written to asking whether they wished to withdraw their claims or whether they wished to continue with the claim either representing themselves or appointing other agents. The claimant indicated that he wished to continue with his claim representing himself. The claimant attended various case management preliminary hearings dealing with his claim amongst others from around November 2021 onwards. Initially the claimant's claim was managed as part of the multiple but from March onwards it was separated out and individual case management hearings were fixed with a view to establishing the nature of the claimant's claim and the best way of dealing with this at a hearing. During the case management process the claimant was encouraged to set out the precise nature of the claims which he was making. Various orders were made for the claimant to provide further particularisation of his claim. The claimant set out his position in various emails which he sent to the respondent. As the nature of the claimant's position became clearer the respondent indicated that they considered that the claimant was no longer seeking to pursue the claim which had been lodged back in 2016 but now appeared to be wishing to amend his claim so as to include entirely new claims based on different legal principles and involving entirely different comparators from that which had been set out at an earlier stage. An open preliminary hearing was fixed for the purpose of determining whether or not the claimant should be permitted to amend his claim in this way. At the hearing both parties were invited to make legal submissions and both set out their respective positions. The claimant made his submissions orally. Ms Macara for the respondent submitted written submissions which she expanded upon orally and clarified for the benefit of the claimant. The claimant was then given the opportunity to comment on these. The respondent had put together a bundle of documents which were referred to during submissions.

Claimant's submissions

2. The claimant made the point several times that he did not understand what he termed "legal jargon". He also had difficulty keeping to issues which were relevant to the matter before the Tribunal. For example he spent a considerable amount of time maintaining his position that Mrs Paterson, one of his comparators, had retired in 1989 and not 1998 as suggested by the respondent. In any event, I understood the claimant's position in relation to the matters which were relevant to my decision to be as follows.

3. The claimant worked for the respondent as a Caretaker or Caretaker Cleaner until he retired in 2018. His employment commenced on or about 22 January 1984. It was his position that he initially worked with a Florence Paterson and it was his position that he did the same work as Mrs Paterson but she was paid at an NW5 grade whereas he was paid at an NW3 grade. He stated that Mrs Paterson retired in or about 1989 but that he continued to do her job until a Mr Skelton took over and that he continued doing this work at NW3 until single status came in. I understand his claim to be one that he carried out like work to Mrs Paterson. He also stated that he wished to compare his pay with that of a William Dykes who was also employed as a Caretaker/Cleaner between 1999 and 2013 doing the same work as the claimant. The claimant's position initially appeared to be that Mr Dykes was paid at a higher grade than the claimant but then received an equal pay pay-out and was thereafter reduced to the same grade as the claimant. The claimant later clarified that he was simply passing on what he had heard from someone else and so far as his claim was concerned he understood that Mr Dykes may in fact had been paid at the same rate as him all along. The basis of his claim in relation to Mr Dykes however was that Mr Dykes had received a "pay-out" in respect of an equal pay claim submitted on his behalf and the claimant had not. It was his position that in order to obtain such a pay-out Mr Dykes must have been in a position to compare his pay with that of women and although the claimant did not know the identity of these comparators he wished to receive a pay-out the same as Mr Dykes. The claimant also confirmed that he wished to claim parity with three other cleaners who were women who the respondent had identified as Ms Harper, Ms McCafferty and Ms Connell. It was his understanding that these women did the same work as him and were paid the same as him but at some point had

received a pay-out in respect of their equal pay claims. The claimant's position was that he previously knew nothing whatsoever about the possibility of making an equal pay claim. He advised that at some point he had become aware that other employees of the respondent had received a pay-out in respect of an equal pay claim. He understood the union had been involved in prosecuting this equal pay claim. The claimant was a member of the union. He contacted the union on behalf of himself and five others who worked in similar jobs and asked why he had not been contacted about the claim. He advised that the union official had told him letters sometimes go missing. In any event, the union did not submit a claim on his behalf. Subsequently the claimant became aware that Messrs Dallas McMillan were pursuing equal pay claims in respect of certain employees. He contacted Dallas McMillan and he and his five colleagues had claims submitted on their behalf by that firm in 2016 along with a substantial number of other claims.. The claimant advised that he had subsequently been advised by Messrs Dallas McMillan in the summer of 2021 that they were no longer prepared to represent him. He advised frankly that they told him he did not have a claim. The claimant disagreed with that and wrote to the Tribunal confirming that he wished to pursue the claims on his own behalf.

4. The claimant was extremely aggrieved that others had received pay-outs from the respondent while he had not.

Respondent's submissions

5. The respondent's submissions are referred to for their terms. The respondent's position was that it was highly unusual for the Tribunal to entertain an application to amend in a case such as this where, despite the fact the claimant had been asked to do so on numerous occasions, the claimant had failed to set out his claims on a single sheet of paper. The respondent were however trying to be helpful and had lodged a number of the emails which had passed between them and the claimant together with various documents which they had obtained from their records in relation to the claimant's work history and that of his comparators. The claimant's representative then set out what they understood the original claim to have been. They set out what they

understood the claimant was now seeking to claim by way of amendment. They set out the respondent's position in respect of each of the claims made and finally they addressed the various factors which the Tribunal would require to take into account before deciding whether or not to exercise its discretion to allow the amendment. They confirmed that they considered that the Tribunal ought to approach matters in the way suggested in the well-known case of ***Selkent Bus Company Ltd v Moore***. They noted that at an earlier stage of the proceedings the claimant had been referred to this case by the Tribunal.

6. The respondent's position was set out in detail in their submissions however it is as well to summarise. It was their position that the claim was initially pled for work rated as equivalent or work of equal value. Four comparator roles were mentioned: Handyperson/Labourer; Gardener 1; Road Sweeper; and Waste Disposal Operative. The respondent identified the claimant was now making six claims.

(1) During the period 1984-1989 he worked as a Caretaker at High Valleyfield Community Centre with Ms Paterson. The claimant was paid at Grade 3 and Ms Paterson was paid at Grade 5.

(2) Various unnamed individuals comprising both males and females received pay-outs in respect of equal pay claims after single status came in to being in 2007. The claimant and his four colleagues did not receive any such pay-out.

(3) The claimant's contract changed in 2013 from Caretaker to Caretaker Cleaner.

(4) He is aware of a male Council employee (Mr Dykes) who was being paid as Grade 5 and was thereafter reduced to Grade 3 and was given a large pay-out in respect of an equal pay claim.

(5) That posts should be compared to that of School Janitor and he is aware of an unnamed lady in his village who worked as a School Janitor and was on Grade 5.

(6) That one of his comparators was Ms Marianne Bain who was employed on a split contract working 16 hours as Centre Supervisor

and 20 hours as Caretaker Cleaner but it was his position that she was being paid a Grade 4 for both jobs whilst he was being paid on the basis of Grade 3 as a Caretaker Cleaner.

7. The respondent then go on to surmise that the claim mentioned at (1) relates to Ms Paterson, that the claim (2) appears to relate to three comparators: Karen McCafferty, Josephine Harper and Karen Connell (nee Miller) as a claim of like work to those who received equal pay settlements previously. With regard to claim (3) this appears to relate to William Dykes who the claimant states was doing an FC5 Grade but the respondent's records show as being paid at FC3 for the whole of his employment. Amendment (4) relates to an unnamed School Janitor and the respondent were unable to comment further on this. Claim (5) would appear to relate to Marianne Bain where the claimant appears to be claiming that he did like work with her albeit she was paid for at least some of the time as a Supervisor rather than a Caretaker Cleaner.

8. The respondent then set out their position with regard to these claims. They indicate they have done so from the records which they have been able to trace from their records. They note that Ms Paterson was employed from around 1975 and their position is that she left work in 1998 and not 1989 as stated by the claimant. The respondent denies that Ms Paterson was paid more than the claimant for like work. Any claim based on Ms Paterson as a comparator would have been time barred at the time the claimant's initial claim was raised in 2016. The comparison period would have stopped in 1998 (or 1989 if the claimant's date is correct), either way such a claim would have been time barred from the start. In any event, the respondent points to the fact the claimant's contract was validly varied in 1999 and in 2013 and that these variations would supersede any prior breach of the sex equality clause for the amended claim.

9. With regard to Messrs Harper, McCafferty and Connell it is noted the claimant does not say that he was paid less for like work in respect of these comparators for any period after the date on which they allegedly received an equal pay pay-out. The respondent's position therefore would be that even if the claimant's assertion was correct numerous questions

would arise regarding the relevant period in terms of arrears for any claim of back pay for the claimant. Back pay would only be granted for a period of five years. It was the respondent's position that this would be five years back from the date of the amendment. This would mean that if the compensation was paid prior to July 2017 the claimant could not compare himself with these individuals during a period in which they were paid more than him. With regard to claim (3) the respondent's position is that Mr Dykes is, like the claimant, male and the claimant cannot make a valid comparison with Mr Dykes. In any event, the respondent lodged documents to show that Mr Dykes was not previously or ever a grade FC5. Even if the claimant were in some way able to make a claim based on Mr Dykes, he would be in the same difficulty as with the claims relating to Messrs Harper, McCafferty and Connell. If any potential claim relating to a compensation payment were to be allowed back pay would only be granted for a period of five years. The limitation period would start from the date of the purported amendment which would result in any claim relating to the period prior to July 2017 being barred by the passage of time. The respondent's position regarding claim (4) is that the claimant has not identified any relevant comparator nor provided them with enough information to comment.

10. With regard to claim (5) the respondent refers to various documents which they lodged which indicated that Ms Bain had been in a different role to the claimant at a higher grade since 2014. The respondent therefore dispute that Ms Bain was carrying out like work with the claimant and being paid at a higher rate. The respondent's position is that she was being paid at a higher rate because she was doing a supervisor role. The claimant appears to accept that she was doing this supervisor role from 2014 onwards. The respondent's position is that if this is correct then the claimant's equal pay claim could only relate to a short period lasting from the date his contract was varied in 2013 until Ms Bain started the supervisor role in 2014. Even if this were the case, which the respondent do not accept, the claimant's claim would depend on him establishing that Ms Bain was carrying out like work as him and furthermore he would only be in a position to make this comparison for a period of a few months running from the date his contract was varied in 2013 until 2014 when

Ms Bain took up her new role. Given that this claim is now being added by way of amendment the claimant is only entitled to go back five years and the comparison period does not lie within the period from July 2017 onwards.

5 11. On the other hand the respondent do identify that if the claimant is ostensibly offering to prove that Ms Bain was in fact doing the same work as him from 2014 onwards despite her promotion to supervisor, the respondent's position is that the claimant is not in a position to make such a claim because they have carried out a valid job evaluation scheme which 10 assigned Ms Bain to a higher grade than the claimant. The Tribunal has also found as a preliminary issue in the main litigation relating to the multiple that the job evaluation scheme was valid. There is currently ongoing proceedings by certain of the claimants who have alleged that the scheme was unreliable or tainted by discrimination but so far the claimant 15 does not appear to be alleging this.

12. Having set out their general position on the amendments the respondent then set out their position as to the various factors which it is suggested the Tribunal should take into account. They recognised that the ***Selkent*** factors are not a checklist but have used these as a guide to their 20 submission. I shall set out my decision on these factors below and refer where appropriate to the respondent's submissions in this regard.

Discussion and decision

13. The sole issue which I required to determine at the preliminary hearing was whether or not the claimant's application to amend should be allowed. 25 At the end of the hearing the respondent's representative made the point that if the claimant was not permitted to amend his account then the claimant's remaining existing claim should be struck out as having no reasonable prospect of success. This was on the basis that, given the terms of the amendment, the claimant is clearly no longer insisting on his 30 original claim and is not in a position to prove any of the facts which he offered to prove at that earlier stage. If this is the case then it is axiomatic that such a claim has no reasonable prospect of success. For the avoidance of doubt, my decision today is solely about the issue of whether

or not to accept the amendment. Given that I have not accepted the amendment the decision as to whether or not the remaining clam should be struck out will require to be dealt with subsequently.

Discussion and decision

14. The Employment Tribunal has a power within its rules to regulate its own procedure. One of the matters which the Tribunal has discretion to in terms of its procedural roles is to allow a claimant to amend the claim which they have originally made in their form ET1. Although the Tribunal has this discretion it is not an unfettered discretion and over the years the higher courts have set out clear guidelines which require to be applied by Tribunals. The case of ***Selkent Bus Company Limited v Moore*** is one of the cases which sets out the general approach which Tribunals should take. The Tribunal should adopt a multi-factorial approach taking into account all relevant circumstances. As noted by the respondent this includes the nature of the amendment, any time limits which are applicable, the timing and manner of the application and the balance of injustice and hardship. Taking each of these in turn I would agree with the respondent's position that the correspondence from the claimant represents a substantial alteration to his claim involving entirely new factual allegations which change the basis of the claim and I would also agree with them that this goes as far as to amounting to an entirely new head of claim. That having been said it is not unusual for equal pay claims to be subject to considerable incremental alteration and amendment as matters proceed. Often, an employee will be able to do little more at the outset than assert that their right to equal pay has been infringed. Comparator roles may be identified. It may be however that the employee at the stage they make their application does not have any detailed information regarding what her fellow employees are being paid and what other arrangements there were during their employment. The higher courts have recognised that a degree of flexibility requires to be shown to claimants with regard to this process. I have to say however that in this case I considered that the claimant's amendment does go considerably beyond what is usual. The claimant is seeking to add what is effectively a piggyback clause in relation to Mr Dykes. The claimant is making a like

work claim in respect of Ms Paterson who he last worked with over 20 years ago on the basis of what the respondent says were her dates of employment and more than 30 years ago on the basis of what the claimant says were her dates of employment. It appears to me that the claim now being made by the claimant is essentially different from that initially made by the claimant as part of the multiple. The multiple claim in general terms stated that "women's jobs" had been rated lower in the respondent's job evaluation scheme than typically male jobs. The thrust of the claim was an attack on the respondent's job evaluation scheme on the basis that female jobs were evaluated at a lower rate than male jobs in a systemic way. The claim which the claimant currently makes bears no relation to this. The claimant is basing his claim on his allegation that at various points he worked alongside certain named individuals who were doing the same job as him but were either being paid more at the time or were being paid more when one takes into account an equal pay compensation pay-out which they received from the respondent as a result of earlier equal pay litigation. The claims are considerably different.

15. With regard to time limits we should first of all note that the position of the Tribunal when considering time limits in the context of an application to amend is slightly different from that when the Tribunal is considering the issue of a time limit in the context of whether an ET1 should be accepted or not. Where the Tribunal is considering whether or not to accept the ET1 the Tribunal is required as a matter of jurisdiction to consider whether the claim has been submitted in time. If it has not been submitted in time then that is the end of the matter, the Tribunal has absolutely no jurisdiction to consider the matter further. On the other hand if the Tribunal is considering time limits in the context of an application to amend then the Tribunal is exercising its discretion under the rules as to whether or not to allow the amendment. The Tribunal already has jurisdiction to hear the case by virtue of the fact that the original application has by this time been accepted. The Tribunal does require to check whether the Tribunal had jurisdiction at the time the initial application was made but the Tribunal is also required to take into account the applicable time limits when considering whether or not to allow the application to amend. If an application to amend is made after a time limit has expired then this is one

of the matters which the Tribunal requires to take into account in deciding whether or not to allow the amendment but the fact that the application is being made outwith the time limit which would apply to a new fresh claim is not the knockout blow which it would be if one were considering a fresh claim.

16. The time limit for making an equal pay claim is contained in s129 of the equality act. In general terms a claim requires to be brought within 6 months of the ending of the employment to which the claim relates. The claim lodged in 2016 was therefore in time but if the claimant were lodging a new claim today it would be time barred. There is a further issue to do with remedy in that an employee can only go back 5 years. This means a claimant is only entitled to rely on a comparator who was in the same or associated employment within the five years before making the claim. In the case of many of the claimant's comparators they were either not in the same employment five years prior to the date of amendment or, if they were, were paid the same as him during this period given that, if the difference arises from them receiving an equal pay pay-out, that was paid more than five years ago. There is little doubt that the application to amend comes very, very late in the day. With regard to Mrs Paterson the comparison would appear to relate to a period which ended either in 1998 or in 1989. With regard to the other three female comparators mentioned in claim (2) any equal pay claim would appear to relate only to the period during which they received their compensation which, given the claimant said it was around the time of single status, would date this to around 2007. It is within judicial knowledge however that many such payments of compensation were paid in the period around 2014/15 but even if this were the case it would appear the respondent are correct in that the claimant would be unable to obtain any compensation given that he is only entitled to go back for a period of five years in terms of such a relevant comparison.

17. The point is perhaps better dealt with in terms of assessing the overall balance of hardship and injustice in the case but it does appear clear that the effect of the effluxion of time will make it very difficult for the respondent to respond to these claims.

18. With regard to the timing and manner of the amendment the respondent have done a sterling job in trying to put together a coherent claim from the various pieces of correspondence which the claimant has sent in. I make no criticism of the claimant but he is clearly not legally trained nor does he appear to have a grasp of what the Tribunal would normally require from a party by way of stating their case. That having been said it is clear that the claimant was in fact represented by solicitors for the first five years of his claim. In his evidence the claimant made it clear that he had a good idea of the type of claims he wanted to make from an early date and this was what had prompted him to contact his solicitors. There was no evidence whatsoever before the Tribunal as to why the claims which the claimant now wishes to make were not incorporated in his initial ET1 nor why the claimant's solicitors did not seek to amend his claim during the period of approximately five years when they were acting for the claimant. During his evidence the claimant frankly indicated that he had put matters relating to his new claims to them and they did not think that he had a claim. It is not for the Tribunal to reach a conclusion on this but when looking at the timing and manner of application for amendment of the claim the fact that the claimant was legally represented for a period of over five years and made no attempt to amend his claim during this period is clearly something the Tribunal requires to take into account.

19. Finally we have the balance of injustice and hardship. The Tribunal requires to look at what injustice and hardship will be caused to the claimant if his amendment is not permitted and balance that against the injustice and hardship which will be suffered by the respondent if the amendment is accepted.

20. So far as the claimant is concerned he will lose the right to pursue the equal pay claim which he wishes to pursue. The above having been said it is clear to the Tribunal that we are entitled to take into account information which is available to us on the prospects for such a claim. It is clear from the documents which the respondent have been able to identify so far that there are real practical difficulties which will face the claimant in pursuing his claim further. The claimant has not been able to identify the female janitor that he mentions or at least if he has been able

to identify her he has not passed on this information to the respondent. The claimant freely accepts that he has based much of his pleadings on what he believes he was told at the time by various individuals. He has not been in a position to deal with the documentary evidence produced by the respondent. He has not addressed any of the issues raised by the respondent to the effect that even if he is able to make a valid comparison the effect of the five-year time limit means that he will not actually receive any compensation.

21. In balancing injustice and hardship the Tribunal is entitled to take into account that there is much less hardship in being prevented from pursuing a claim which has very little prospect of success and has so far been only poorly specified from one which is properly specified and would appear to have a reasonable prospect of success on the assumption that the claimant's averments are found to be true. It is clear that the respondent dispute many of the averments which the claimant has made and it is also clear from his evidence that the claimant is not really in much of a position to contest these matters. On the other hand, the respondent's position was that if the claimant is allowed to amend then they will be put to considerable further expense in requiring to investigate claims which are incoherently drafted and which go back many, many years.

22. My view, having taken all of these matters into account, is that whilst there is no doubt the claimant will feel aggrieved if his amendment is not accepted I consider that the balance of injustice and hardship in this case somewhat unusually falls in favour of not allowing the amendment. I also consider that the timing of the application to amend weighs very heavily in suggesting that the amendment should not be permitted.

23. The claimant has raised proceedings through solicitors. He continued to be represented by these solicitors for a period of years. If the claimant's claim required to be amended then there is no explanation as to why these solicitors did not submit an application at the time. The claimant's evidence was to the effect that he had had various conversations with them and that they had said various things to him, the general tenor of which was that his claims could not succeed. Clearly the claimant does not agree with them but in my view it is inappropriate for the claimant to

retain the services of solicitors for a period of years and then once they eventually withdraw from acting seek to make amendments to his claim which could readily have been made at a much earlier stage. For the above reasons the claimant's application to amend his claim is refused.

5 24. As noted above the respondent during their closing submission indicated that in their view if the amendment were not permitted then the claim ought to be struck out. In the circumstances I will order that the claimant advises the Tribunal within the next 21 days whether or not he intends to proceed with his claim as unamended. If he indicates that he does not wish to
10 pursue the unamended claim then his claim will be taken to be withdrawn and dismissed. If he does indicate that he wishes to proceed with his unamended claim then it will clearly be open to the respondent to apply for strike out.

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Employment Judge : I McFatridge
Date of Judgment : 02 August 2022
Date sent to parties : 02 August 2022

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