



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103802/2022 & 4103932/2022**

**Open Preliminary Hearing (OPH) Held in Chambers on 4 April 2023**

5 **Employment Judge: A Strain (sitting alone)**

**Mr J Taylor**

**First Claimant  
Represented by:  
Mr W McParland –  
Solicitor**

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**Mr P Dolan**

**Second Claimant  
Represented by:  
Mr W McParland –  
Solicitor**

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**ADL Lift Services Limited**

**Respondents  
Represented by:  
Ms Georgia Kennedy-  
Curnow -  
Litigation Consultant**

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**JUDGEMENT OF THE EMPLOYMENT TRIBUNAL**

The judgement of the Tribunal is:

1. the application to amend the claim by P Dolan (**4103932/2022**) in so far as to include a claim for a redundancy payment in terms of section 135 of the Employment Rights Act 1996 (**ERA**) is granted; and
2. the application to amend otherwise in respect of both claims is refused.

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**Background**

1. The Claimants presented their ET1s on 11 July 2022 and 15 July 2022 respectively.
2. The First Claimant (Mr Taylor) asserted claims of unfair dismissal, redundancy payment, notice and holiday pay. The Second Claimant (Mr Dolan) asserted a claim of unfair dismissal and a TUPE claim.

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3. The First Claimant stated in his ET1 'I continued to work for ADL until the 20 May but was then told they could no longer keep me in employment'.
4. The Second Claimant stated in his ET1 "employed by adl lift services who lost service contract of north Lanarkshire council housing stock lot 1, that was won by kone lifts, under TUPE, i should have transferred to kone lifts but kone argue TUPE does not apply. i have been left without a job through no fault of my own."
5. The Respondent's primary position was that the Claimants employment had transferred to Kone PLC under TUPE or, in the alternative, had been dismissed by reason of redundancy.
6. The Tribunal in its Judgement in ***Kone PLC v ADL Lift Services Limited*** **4103764/2022** dated 17 January 2023, found that TUPE did not apply.
7. Both Claimants were not legally represented until 16 February 2023.
8. The Respondent provided further and better particulars on 3 March 2023 in which it is asserted that they consulted with the Claimants about redundancy and made them redundant on 16 May 2022. This is disputed by the Claimants.
9. The Claimants submitted an application to amend in response to the further and better particulars on 6 March 2023 in which the First Claimant seeks to add a claim for unlawful deduction from wages under s.13 of ERA. He maintains that - in circumstances whereby the Tribunal found TUPE did not apply – that he remains employed by the Respondent. The primary position being that he remains employed and has suffered (and continues to suffer) a series of unlawful deductions from wages. He claims, in the alternative, 1. a redundancy payment in terms of s.135 ERA; 2. unfair dismissal contrary to s.94 ERA; and 3. wrongful dismissal contrary to s.86 ERA.
10. The Second Claimant seeks to add claims for unlawful deduction from wages under s.13 of ERA; a redundancy payment in terms of s.135 ERA 1996; and wrongful dismissal contrary to s.86 ERA.

11. The Respondent opposed the application to amend by email of 15 March 2023. In this email the Respondent confirmed that they did not oppose the application to include redundancy pay but they did oppose all further amendments.

5 12. Written Submissions were ordered from both Parties by Employment Judge McPherson on 17 March 2023.

13. An Open Preliminary Hearing (**OPH**) was fixed to consider the Claimants' application to amend.

14. The Parties lodged Written Submissions in advance of the OPH.

## 10 **The Relevant Law**

### *Amendment*

15 15. The Claimants seek to amend their applications to include unlawful deductions claims, wrongful dismissal claims and in the case of the Second Claimant, a claim for redundancy payment. These are new grounds of claim.

### **Overriding Objective**

16. The starting point for the Tribunal in considering any such application is the "overriding objective" which provides:

#### *Overriding objective*

20 2. *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*

(a) *ensuring that the parties are on an equal footing;*

25 (b) *dealing with cases in ways which are proportionate to the complexity and importance of the issues;*

(c) *avoiding unnecessary formality and seeking flexibility in the proceedings;*

- (d) *avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) *saving expense.*

5 *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

### **Applications to Amend**

- 10 17. In the context of applications to amend the Tribunal should have regard to the case of ***Selkent Bus Company Ltd v Moore [1996] IRLR 661*** (which was followed by the EAT in Scotland in ***Amey Services Ltd and another v Aldridge and others UKEATS/0007/16***). The EAT held that, when faced with an application to amend, a Tribunal must carry out a
- 15 careful balancing exercise of all the relevant circumstances, weighing up the balance of injustice or hardship that would be caused to each party by allowing or refusing the application. This would include the nature of the amendment, the applicability of time limits, and the timing and manner of the application.
- 20 18. In the case of ***Vaughan v Modality Partnership [2020] UKEAT/0147/20***, the EAT held that Selkent factors may be relevant but should not be used as a checklist to be ticked off to determine the application but are factors to take into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or
- 25 refusing the amendment

### **Time limits**

19. In this case the amendment purports to introduce claims which may be time barred. The time limit for an unlawful deductions claim and a wrongful dismissal claim to be presented to a Tribunal is 3 months minus
- 30 1 day unless the Tribunal is satisfied that it was not reasonably

practicable for such a claim to have been presented before the end of the relevant period of three months, then the Tribunal may consider the claim if it is presented within such further period as the Tribunal considers reasonable.

## 5 **Submissions**

### *The Claimants*

20. It was accepted that the amendment would include new claims but that these were on the same facts and did not substantially alter the nature of the claims against the Respondent.
- 10 21. If the claims were out of time then the Tribunal should extend the time limits.
22. The amendment was not made sooner as the Claimants had not been legally represented until 16 February 2023 and was made in response to new facts and information contained within the Respondent's further and better particulars of 3 March 2023.
- 15 23. The amended claims had reasonable prospects of success.
24. The claims were already pled in the McCorkindale case so there would be no need to amend the Respondent's response and the Hearing would not need to be extended.
- 20 25. If the amendment were not allowed there would be prejudice to the Claimants in that they would be prevented from pursuing a remedy for contractual entitlements.
26. There would be no prejudic to the Respondent as they would have to defend the claims in the context of the McCorkindale case.
- 25 27. The question of whether an amendment should be allowed is a matter for the Tribunal's discretion which should be exercised in such a way as to arrive at a just result. The balance of justice is always key. The Tribunal should exercise its discretion in accordance with the overriding objective

and consider all of the relevant factors having regard to the interests of justice and the relative hardship that would be caused to the parties. The Claimants submit that weighing everything in the balance the just result would be for the Claimant to be given permission to amend the claim.

5 *The Respondent*

28. The Respondent did not object to the amendment to include the redundancy payment claim for the Second Claimant.
29. The Respondent submitted that the amendments were not minor in nature. The amendment presented an entirely new and contradictory primary claim and was contrary to the overriding objective.
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30. If allowed the amendment would cause further delay to the proceedings as the Respondent would need time to lodge an amended response and the Hearing would need to be postponed to allow sufficient time to deal with the additional claims.
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31. The claims were substantially out of time and should not be extended. The lack of legal advice was not sufficient as they could have obtained legal advice sooner.
32. The Respondent would suffer prejudice and hardship if the amendment was allowed in that additional costs would be incurred.
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33. Allowing the amendment would run contrary to the overriding objective.
34. The claims have "lack of prospects".
35. The Respondent would be facing significant new claims (significant in term of monetary value).
36. The Respondent would require further disclosure from the Claimants to defend the claims and quantify them.
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37. The Claimants would potentially be unjustifiably enriched if the amendments were allowed.

38. The further and better particulars provided did not change the circumstances under which the Claimants could have presented their claims.

### Decision

5 39. In light of the Respondent's position that they would not oppose the application to include a claim for redundancy pay in respect of the Second Claimant the Tribunal allowed the amendment in so far as a claim for redundancy pay was concerned.

10 40. The Tribunal then considered the Parties submissions and the remaining content of the amendment.

In this context the Tribunal adopted and followed the approach of the EAT in **Selkent** and **Vaughan**.

### *Nature of the Amendment*

15 41. The Claimant's amendment seeks to add in new claims of wrongful dismissal and unlawful deductions. If allowed, the amendment would add claims which clearly sought to proceed on a set of facts and circumstances which had not been pled and was contrary to the facts and circumstances currently pled by the Claimants.

20 42. The Claimants' cases as originally and currently pled clearly indicated that they considered their employment with the Respondent to have come to an end (*'I continued to work for ADL until the 20 May but was then told they could no longer keep me in employment'* and "i have been left without a job through no fault of my own."

25 43. Both Claimants presented cases of unfair dismissal which clearly indicated that they considered their employment to have been terminated.

*Claims out of time**Wrongful Dismissal*

44. The Tribunal considered that the claim of wrongful dismissal contained within the proposed amendment was considerably out of time. Whilst the Tribunal accepted and acknowledged that the Claimants did not have the benefit of legal advice the fact that they had not obtained such advice did not mean that they could not have presented such claims in their original ET1s. It would have been reasonably practicable for them to have done so.

*Unlawful Deductions*

45. The Claimants' submissions were to the effect that if these claims were out of time then the Tribunal could exercise its discretion to extend the time limit and allow these claims to proceed.

46. The Claimants make no submissions on whether or not it is asserted that the failure to pay wages was or is a continuing act. If it is the case that it was/is a continuing act then the claims may not be out of time.

47. If the claims were presented out of time then the Tribunal could see no basis for finding it would not have been reasonably practicable to have presented them in time.

*Timing and Manner of the application*

48. The Claimants' submissions were to the effect that the application should not be refused solely because there has been delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is a discretionary factor. It is relevant to consider why the application was not made earlier. The amendment application was made shortly after the Respondent submitted further particulars alleging new facts and information. These further facts and information were not available to the Claimants at the time the ET3 response was submitted.



49. The Tribunal did not accept the submission that the amendment was not made earlier because the facts and circumstances upon which it relies was not made known to the Claimants until the Respondent lodged their further and better particulars on 3 March 2023.

5 50. The Claimants presented claims of unfair dismissal. They clearly considered their employment with the Responent to have ended. A claim of wrongful dismissal would have been consistent with the facts and circumstances upon which their original claims were based.

10 51. If they considered that their employment was continuing with the Respondent then that is a state of facts that ought to have been in existence and capable of being presented when the Claimants' lodged their ET1s.

#### *Overriding Objective*

15 52. The Tribunal considered that refusal of the application to amend was in accordance with the overriding objective.

53. The amendment seeks to introduce new claims which proceed on a factual basis contrary to the claims as currently pled. Further, the claims would require response by the Respondents which would entail potential delay and additional expense.

20 54. The claims of wrongful dismissal were time barred and could have reasonably been presented in time.

55. The claims of unlawful deductions could reasonably have been presented in the original claim if the Claimants had considered their employment ongoing.

25 56. The application to amend is late in the proceedings with a hearing fixed for 9-12 May 2023.

57. The Tribunal have considerable doubts about the prospect of success of the unlawful deductions claims on the basis of the facts and circumstances relied upon.

58. The Tribunal considers that there would be considerable prejudice to the Respondent in allowing the amendment given that it would need to be responded to, there would be potential delay and further expense. The hearing currently fixed would likely be postponed.
- 5 59. The Tribunal did not accept that refusal of the amendment would greatly prejudice the Claimants in the manner suggested. In any event the balance of prejudice favoured the Respondent.
60. The Tribunal considered that the interests of justice favoured the refusal of the amendment.
- 10 61. The application to amend is accordingly refused (under exception of the amendment to include a claim for redundancy payment which is allowed).

**Employment Judge: A Strain**  
**Date of Judgment: 4 April 2023**  
**15 Entered in register: 13 April 2023**  
**and copied to parties**