



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 8000167/2022 Preliminary Hearing by Cloud Video Platform at  
Edinburgh on 9 May 2023**

**Employment Judge: M A Macleod**

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**Norman Hearty**

**Claimant  
In Person**

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**David Philp Commercials Ltd**

**Respondent  
Represented by  
Ms S Thompson Robertson  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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**REASONS**

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1. In this case, the claimant has presented further and better particulars to the Tribunal in addition to his original claim.
2. The respondent objected to the claimant being permitted to add the further and better particulars, on the basis that the additions amounted, in fact, to an application to amend the claim, which was opposed.
3. A Preliminary Hearing was listed to take place by CVP on 9 May 2023 in order to hear submissions from both parties and determine whether (a) an

application to amend the claim is required; and (b) if so, whether that application should be granted.

4. The claimant represented himself, and Ms Thompson Robertson appeared for the respondent.
- 5 5. Ms Thompson Robertson agreed to present her submissions first. This would allow the claimant to respond to her submission, and I confirmed that in the event that the claimant raised any matter which she considered she wished to respond to, she would be permitted to do so.
- 10 6. I had access to the digital Tribunal case file, and to the Note of Arguments submitted by the respondent in advance of the Hearing.
7. I summarise below the claimant's further and better particulars, submissions made by the parties, respectively, then the relevant law, followed by my decision and the reasons therefor.

#### **Claimant's Further and Better Particulars**

- 15 8. The claimant presented a claim to the Employment Tribunal on 2 December 2022, in which he complained that he had been unfairly subjected to detriments following the making of protected disclosures, and was owed arrears of pay.
- 20 9. He set out a narrative at paragraph 8.2 of the claim form, in which he referred to a series of events from 13 July 2022 until (it seems) October 2022, commencing with his return from work with Covid symptoms. He also made reference to having raised a claim with the assistance of Messrs Digby Brown concerning personal injuries sustained in an accident at work on 26 July 2022.
- 25 10. Under paragraph 12, he ticked "Yes" to the question "Do you have a physical, mental or learning disability or health condition that means you need support during your case?". He added that "I suffer from anxiety and depression it helps if I have a bit of time and written information."

11. On 22 February 2023, the claimant presented further and better particulars to the Tribunal, with a copy sent to the respondent.
12. In those further and better particulars, the claimant stated that he suffered from Anxiety, Depression and Borderline personality disorder also known as Emotionally Unstable Personality Disorder. He provided a description of the symptoms which he suffered as a result of this condition, including explosive anger, emotional swings, impulsive behaviour, self harm, tiredness, lack of motivation, concentration and memory problems, and suicidal thoughts.
13. He submitted that he wished to rely upon claims under section 26 of the Equality Act 2010 (harassment on the grounds of disability); section 19 (indirect discrimination on the grounds of disability); section 15 (discrimination arising from disability); section 20 and 21 (failure to make reasonable adjustments) and section 27 (victimisation on the grounds of disability).
14. He provided further details of each of these claims as set out in the document.
15. On 13 April 2023, the claimant provided a second set of further and better particulars, in which he sought to introduce a complaint under section 13 of the 2010 Act, that is, direct discrimination on the grounds of disability.
16. The claimant also sought to provide further details of each of the heads of claim set out in his first set of further and better particulars.
17. The respondent argued that the claimant was seeking to introduce claims of disability discrimination, including direct and indirect discrimination, harassment and victimisation, not previously pled in his ET1. They also submitted that there was no early conciliation process in respect of the additional claims, and that they were time barred.

**Submissions - Respondent**

18. Ms Thompson Robertson presented a note of argument in advance of the Hearing, and relied upon it in her oral submissions.

19. She submitted that the claimant seeks to introduce entirely new heads of claim of disability discrimination, including:

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- Direct discrimination;
- Indirect discrimination;
- Discrimination arising from disability;
- Failure to make reasonable adjustments;
- Harassment; and
- Victimisation.

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20. She maintained that the amendment sought by the claimant amounts to a substantial alteration of the claims made.

21. Mrs Thompson Robertson argued that the claimant could have presented the claims in time, as he was aware of all of the facts now relied upon at the time when he presented his original claim on 2 December 2022.

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22. Even though he had mentioned the new claims, to some extent, in the agenda to a previous Preliminary Hearing, this is the first time when he has sought to introduce them in accordance with the Tribunal's Rules of Procedure.

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23. Mrs Thompson Robertson went on to submit that the new claims are of dubious merit, and have little reasonable prospect of success.

24. She submitted that if the application to amend were granted, the prejudice would fall much harder on the respondent than upon the claimant in the event that the application were refused. If the application were granted, the

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respondent would have to expand significantly the scope of their inquiries, and investigate matters which took place some time ago.

### **Submissions - Claimant**

5 25. The claimant said that he had told ACAS from the start that inappropriate comments were being made to him by Mr Hutton, the manager against whom he makes allegations in his amendment application. He believed that there was a "continuation" on the basis that the discrimination was ongoing. He maintained that the last act of discrimination by the respondent was the lodging of the ET3 to the Tribunal.

10 26. He did accept, before me, that on paper his claims in his application to amend are new, but that due to his condition, it takes him some time to understand what needs to be included. The condition he relies upon is depression and anxiety, and borderline personality disorder. The way the latter affects him, he said, is that he does not have any belief in himself, and  
15 does not deal with matters in a normal way. High levels of stress can cause him to self-harm or even contemplate suicide. He said he tends to run away from things rather than deal with them properly.

20 27. When he decided to submit his new claims, he realised that he had missed out some information from the original ET1. He maintained that this "is not about money", but that he was simply fed up that he had not addressed comments which were made due to his disability, and wanted the opportunity to stand up for himself.

25 28. He submitted that if the amendment were not allowed, he would suffer prejudice, in the form of a "spiral" in his mental health. It would only cost the respondent money, but this is a "David and Goliath" situation. When the respondent thought that this was a simple matter, he said, they were happy to deal with him but once it became more complex they wanted nothing to do with the case. He believed any hardship would fall on him, and not on the respondent.

29. He maintained that the fact that he has been awarded personal dependence payments, which depend on his having a disability, means that he has, in effect, proved that he has a disability. His GP is more than willing to write a letter of support.

5 30. He accepted that his is probably not a strong case, as it is “my word against the respondent’s word”. It is fundamentally a dispute of fact.

### **The Relevant Law**

10 31. It is appropriate to refer to the overriding objective of the Employment Tribunal, set out at Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

*“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;*

15 (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;*

20 (d) *avoiding delay, so far as compatible with proper consideration of the issues; and*

(e) *saving expense.”*

32. There is a useful formulation of the types of amendment which are typically put forward by parties in Tribunal proceedings in *Harvey in Industrial Relations and Employment Law*, Division T at paragraph 311.03:

25 **“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**

5           **distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim; and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.”**

33. An important authority in this area is Selkent Bus Co Ltd v Moore 1996 ICR 836. At p.843, Mummery J, as he then was, said:

10           “(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 allowing the amendment against the injustice and hardship of refusing it.*

15           “(5) *What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.*

20           “(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*

25           *action.*

30           “(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*

*provisions, e.g. in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978.*

5 *(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*

10 *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*

15 *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”.*

20 34. The Tribunal was also referred to **Office of National Statistics v Ali [2004] EWCA Civ 1363**. At paragraph 39, Lord Justice Waller states:

25 *“In my view the question whether an originating application contains a claim has to be judged by reference to the whole document. That means that although box 1 may contain a very general description of the complaint and a bare reference to the particulars to an event..., particularisation may make*

30 *it clear that a particular claim for example for indirect discrimination is not being pursued. That may at first sight seem to favour the less particularised claim as in **Dodd**, but such a general claim cries out for particulars and those are particulars to which the employer is entitled so that he knows the claim he has to meet. An originating application which appears to contain full particulars would be deceptive if an employer cannot rely on what it states...”*



35. In paragraph 40, he went on: *“One can conceive of circumstances in which, although no new claim is being brought, it would, in the circumstances, be contrary to the interests of justice to allow an amendment because the delay in asserting facts which have been known for many months makes it unjust to do so... There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time...”*

### **Discussion and Decision**

36. The application before the Tribunal is to allow the claim to be amended in terms of the application, which is comprised in the further and better particulars submitted by the claimant on 22 February and 13 April 2023.

37. It is useful to note the terms of the original claim, from which this amendment is said to be a significant departure. The claimant ticked the box confirming that he was making a whistleblowing claim, including dismissal or any other unfair treatment after whistleblowing; and a claim that he had been unlawfully deprived of arrears of pay.

38. He also ticked the box, at paragraph 12, identifying that he has a physical, mental or learning disability or health condition which meant that he needed support during his case, confirming that “I suffer from anxiety and depression it helps if I have a bit of time and written information.”

39. In section 8.2 of his claim form, the claimant set out the facts upon which he wished to rely. The complaint made centred on instructions the claimant received when he was returning to work after suffering from Covid-19 symptoms, following which he raised a grievance. There were issues in relation to his pay, about which he was dissatisfied, and he complained that he had been bullied and harassed, following his instruction of Messrs Digby Brown to act on his behalf in relation to an accident at work on 26 July 2022.

40. There was no averment set out within the claim form that the claimant had been discriminated against nor subjected to any detrimental treatment as a result of his disability. The allegations made related to his raising a disclosure to the respondent and suffering ill treatment as a result.
- 5 41. It is noted that the terms of the claim were not as clearly expressed as they might have been, but also that the claimant drafted the claim himself without the benefit of legal advice.
42. A Preliminary Hearing took place before Employment Judge Porter on 28 March 2023, during which it was noted that the claimant now wished to add  
10 claims of disability discrimination. Employment Judge Porter issued Orders in the Note following that Preliminary Hearing ordaining the claimant to present further and better particulars by 14 April 2023.
43. In the Note, it was recorded that the claimant had submitted an email dated  
15 22 February 2023, in which he sought to add new claims, complaining of discrimination on the grounds of disability.
44. He identified the basis upon which he claimed that he was a disabled person, and specified that he wished to make claims under section 26 (harassment), section 19 (indirect), sections 20/21 (failure to make reasonable adjustments), section 15 (discrimination arising from disability)  
20 and section 27 (victimisation).
45. Within those further particulars, he made a number of allegations against Mr Hutton, complaining that he had made remarks about his appearance (“being the most miserable looking person in here”) and about his ability to mix paint. There was also a complaint about Mr Hutton questioning the  
25 claimant several times about apparent lateness when returning from breaks.
46. He also complained that there was a policy to call in (understood to be a PCP under section 19), which caused him difficulty in communicating and using the phone; and a time keeping policy. Associated with that, he claimed that the respondent could have adjusted his start time in order to  
30 accommodate his disability, but failed to do so (under section 20/21).

47. Under section 15, he complained that Mr Hutton had harass him, and send other colleagues to harass him, about being late from breaks, and ultimately choosing to dismiss him due to time keeping.

5 48. Under section 27, the claimant averred that after having an informal discussion with Mr Hutton on 30 September 2022 regarding his issues and grievance, he felt that he was then left with nothing to do or valeting vehicles, or removing vinyl livery from vehicles, on the basis that Mr Hutton had failed to prepare any work for him. He went on to complain that Mr Hutton had made certain comments in the ET3 responding to this claim  
10 which he regarded as discriminatory.

49. The claimant then submitted a second set of further and better particulars on 13 April 2023.

15 50. He sought to apologise for having left information out of the ET1, and then set out questions under different headings, and answered those questions in turn.

51. The claimant started by asserting a claim of direct discrimination (section 13). The less favourable treatment relied upon was that in July 2022 Mr David Philp asked him if he could read, and had read the job cards for the allotted time on the job. He also stated that the less favourable treatment  
20 was ultimately his dismissal on 2 December 2022.

52. Further, the claimant complained that there were a number of named employees who had been attending late or making up time for getting away, and allowed to do so by Mr Hutton.

25 53. The allegations under section 15 were that he had been prevented from carrying out painting or preparation work on a number of occasions, and required to do housekeeping or valeting work instead.

54. The claims under sections 19 and 20/21 were those already set out in the first set of further and better particulars.

55. So far as the claim of harassment was concerned, the claimant made reference to Mr Hutton's statement that he was the most miserable person in the place, but added to that that Mr Hutton had spoken down to him about not knowing the Covid regulations; that Mr Hutton had belittled him in the tone adopted; that he also said that he needed to smile, which led to colleagues calling him Mr Happy; that Mr Hutton instructed a Mr Simmonds to approach him on a number of occasions to question him about his time-keeping.

56. The claim of victimisation was identified as being based on the protected act of raising a grievance and whistleblowing, and the detriment was his dismissal.

57. He sought to expand upon his whistleblowing claim, in clarifying precisely what the disclosures were, and the detriments which followed from the making of those disclosures.

58. It is necessary, then, to characterise the nature of the amendment which has been sought by the claimant. In my judgment, this is a substantial, and not trivial, alteration which the claimant wishes to add to his claim. The claimant has applied to add in a number of claims under the general category of disability discrimination.

59. In the original claim, there was no claim of disability discrimination included, and accordingly the first notice of such a claim came, formally, in the first set of further and better particulars submitted on 22 February 2023. In those particulars, the claimant sought to complain that he had been discriminated against on the grounds of disability under sections 15, 19, 20/21, 26 and 27 of the Equality Act 2010.

60. The second set of further and better particulars, dated 13 April 2023, added a further claim, of direct discrimination under section 13 of the 2010 Act.

61. These were accompanied by new allegations of fact, which had not been raised by the claimant when he presented his ET1.

62. It is necessary, then, to determine the applicability of time limits. There is no doubt that the claimant's application to amend was made outwith the statutory time limits for making a claim of discrimination. The claimant's employment ended on 2 December 2022, the date upon which he submitted his claim form to the Tribunal. However, the allegations relating to harassment relate back to July 2022, though there are suggestions that there was a continuing course of conduct which led up to the claimant's dismissal. The Tribunal did not hear evidence in this Hearing to determine the question of time bar, nor of continuing course of conduct, and accordingly it is a matter to be noted and taken into account, but not at this stage determinative of the issues before me.

63. The timing and manner of the application must be considered. It is quite correct, as the respondent has submitted, that the claimant must have known about the events which he has now sought to plead in his amendment when he submitted his claim. They were all events which took place within his knowledge - they happened to him, as he asserted - before he submitted his claim. He has not explained their omission from his claim, other than to say that his mental health condition of depression and anxiety, allied to his borderline personality disorder, has created some difficulties for him in thinking through and preparing his claim form, and formulating his claim.

64. It is also noted that he has presented his amendment in two separate stages, on 22 February and 13 April, and no explanation has been put forward as to why he did so. The second set of further particulars sought to introduce yet a new claim, of direct discrimination, though on close inspection it appeared to me to be largely a re-statement of his claim of harassment rather than a separate matter. The one exception to this was his assertion that a number of comparators, whom he named, were not subjected to the same level of scrutiny and criticism as he was in relation to his timekeeping.

65. One concern which arises when a claimant, perhaps particularly an unrepresented claimant, raised claims in a piecemeal manner over a period

of time is that there may be more allegations which he is hoping to raise at a later stage. In this case, it appears to me that the claimant has presented all of the claims he wishes to make now, and therefore there is little risk that he will seek to amend his claims further.

5 66. The balance of prejudice requires to be taken into account. If the amendment were to be allowed, it would require the respondent to carry out considerable additional investigations, involving a number of witnesses and individuals against whom specific allegations have now been made. That would increase the cost of their preparations for any final hearing, and likely  
10 increase the length of the hearing itself.

67. The prejudice to the claimant, if the application were refused, would be that he would lose the opportunity to make a claim that he had been discriminated against by the respondent on the grounds of disability, something he plainly feels strongly has taken place. He also submitted that  
15 if he were not allowed to make this claim, it would have a significantly detrimental impact upon his mental health. He makes such an assertion, however, without any medical evidence to support it.

68. Having considered all of these factors, I have come to the conclusion that the claimant's application to amend should not be granted. As the claimant  
20 has himself accepted, the amendment he seeks is a significant alteration to his claim. It involves new allegations of discrimination on the grounds of disability. There are no good reasons put forward and properly supported by the claimant for his failure to present his claim in full to the Tribunal when he submitted his claim form.

25 69. The claimant has suggested that one of the reasons why he was unable to include these allegations in his original claim form was that he was unwell. However, he has produced no medical evidence to support this assertion, and it would be necessary for the Tribunal to see clear and objective confirmation that he was suffering from illness such as to prevent or inhibit  
30 him from presenting his claim in full. The reality is that he presented a claim to the Tribunal in which he was able to identify particular legal claims, at the

time, and he has not explained how he was in a position to do so and yet unable to introduce a claim for disability discrimination.

70. The introduction of the amendment, in two separate tranches, is unhelpful and slightly confusing.

5 71. It is clear that allowing the claimant to introduce his amendment would require the respondent to spend considerable time and expense in expanding their defence to the claim. There are new allegations here, which have not been made before, and the respondent would require to investigate the circumstances so as to identify the correct individuals to  
10 speak to, then speak to them and prepare their defence accordingly. It is likely that the final hearing would be extended beyond what would be required now.

72. The claimant maintained that the prejudice to himself would be greater than that to the respondent in the event that their respective submissions were  
15 rejected by the Tribunal. In particular, he suggests that his mental health would spiral if he were not allowed to amend his claim. Unfortunately, he has not produced medical evidence to back up that assertion, and it is not clear why that is so. He indicates that he could get a report from his GP. The difficulty for the Tribunal is that he has not done so.

20 73. The claimant must have been aware of the facts which he is relying upon in his application to amend, at the time when he presented his claim to the Tribunal. No reason has been given as to why he was not in a position to present all of the relevant allegations to the Tribunal at the point when he was presenting his claim form in the first place.

74. Accordingly, I do not consider that it would be appropriate nor consistent with the overriding objective to allow the claimant to amend his claim at this stage. It would not be in the interests of justice to do so. His application to amend is therefore refused.

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15      **Employment Judge:      M Macleod**  
         **Date of Judgment:      12 June 2023**  
         **Entered in register:      12 June 2023**  
         **and copied to parties**

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I confirm that this is my Judgment in the case of Hearty v David Philp Commercials Ltd and that I have signed the Judgment in electronic format.